The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Inside:

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The Elder Law Advocate

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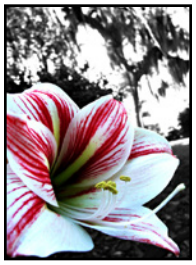
The Elder Law Advocate will be glad to run corrections the issue following the error.



COVER ART

Amaryllis

Photo by Jenn Weitzel
Special Needs Lawyers PA
Clearwater, Fla.

Contents:

The deadline for the FALL ISSUE is November 1, 2012. 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 Stephanie M. Villavicencio at svillavicencio@zhlaw.net, or call Arlee Colman at 800/342-8060, ext. 5625, for additional information.

The last 20 years — A historical perspective

by Enrique Zamora, Immediate Past Chair

I'm trying to avoid repeating what other chairs have written at the end of their terms, but I'm bound by tradition and compelled by my reliance on the wisdom of my predecessors to develop a historical perspective of our section.

At the end of his term as chair, Leonard Mondschein, my immediate predecessor, attempted to predict the next 20 years for the section.[1] For my part, I have tried to fulfill his vision, and it is now up to the next 19 chairs to make it a reality. I want to emphasize that my limited accomplishments as chair could not have been achieved without the help of my friends, who assisted me tirelessly throughout this year. However, I choose not to name them, instead quoting Babette Bach, "So to my friends—and you know who you are—I say thank you."[2]

During our June meeting, my last official function as chair of this section, Twyla Sketchley, your new chair, conducted an important long-range planning session. I was elated to see so many of you there to contribute to this bold look forward into our future. During this meeting, I also had the honor to present the Charlotte Brayer Public Service Award to Scott Selis for his outstanding work as chair of the Legislative Committee and for his contributions to the Public Policy Task Force. I was surprised to find out I was the only member of the Executive Council in attendance that had actually met Charlotte Brayer. So, I took a couple of minutes to talk about Charlotte. Suffice it to say, this founding member of our section was a champion of the elderly and a recipient of many pro bono service awards, including the Second Judicial Circuit Pro Bono Award, and she graduated from law school at age 64. She went on to work tirelessly to change things for the better on behalf of the elderly. I think Charlotte was and is an outstanding example of an elder law attorney.[3] By the way, Twyla was also a recipient of the Second Judicial Circuit Pro Bono Services Award, and Linda Chamberlain believes there is a parallel between Twyla and Charlotte.[4]

I have personally met every chair of this section except the first one. They all had a vision for this section, and they all accomplished many things during their terms. The elderly are better protected today because of what we accomplished under our section's leadership. I believe that to achieve Len's vision for the next 20 years (well, really only 19 are left), we need to look back at the last 20 years and examine the achievements of the section under the leadership of the past chairs. We cannot define where we are going unless we are cognizant of where we have been.

The practice of elder law is dynamic, challenging and stressful, but it is also rewarding. It is our chosen burden to defend the defenseless, because no one else will. The practice of elder law did not exist 25 years ago, even though the need for it was there. This section, through its members, has been addressing this need for over 20 years. I'd be remiss if I didn't mention at least two of our members. Charles (Charlie) Robinson, our chair during 1997-1998, has remained very active, representing the interests of our section as a liaison with RPPTL and as a member at large of the Public Policy Task Force. The section also has had many unsung heroes that have carried the burden in the background, like Tish Taylor, who was the editor of *The Elder Law Advocate* for 10 years and under whose direction it evolved from a newsletter to a magazine. I could fill pages with the names of those members who preceded us and who contributed and who still do with their time and effort to get us where we are and beyond. We, the members of this section, have what Scott Solkoff defined as "directed passion."[5] Our passion is to represent to the best of our ability the elderly and the disabled. Therefore, quoting Scott, "once the passion is determined, sleep on it and live with it."

Let's follow the example of the past great champions of the elderly. One of my favorites is Claude Denson Pepper. He was an attorney, state representative, U.S. senator and U.S. representative, but above all he was a champion of the poor and the elderly. He was elected to the United States House of Representatives in 1962 for a newly created district that included parts of Miami and Miami Beach. In 1980 he helped Alan Greenspan reform the Social Security system to maintain its solvency. This is only one among his many achievements. We can learn from the past as we move forward. However, we cannot afford inertia. This was Emma Hemness's concern in 2008,[6] and it is my concern today.

We, as a section, have overcome many obstacles, but many more lie ahead. Let me finish with my favorite quote from Claude Pepper: "Life is like riding a bicycle; you don't fall off unless you stop pedaling." My colleagues, let's keep pedaling, both individually and as a section, and we will not fall off. Thank you for the opportunity to serve as your chair.

Note: If you haven't kept copies of prior issues of *The Elder Law Advocate*, I encourage you to read them online. They are available at our website. I bet you'll learn a thing a two.

Endnotes:

1 Mondschein, Leonard. "The next 20 years." *The Elder Law Advocate* Summer 2011: 3.

2 Bach, Babette B. "An adventure outside my comfort zone." *The Elder Law Advocate* Summer 2010: 3.

3 For a detailed history of Charlotte Brayer's accomplishments, refer to *The Elder Law Advocate* Spring 1998: 7.

4 Chamberlain, Linda. "Congratulations to new CELAs, ELS award winners." *The Elder Law Advocate* Summer 2009.

5 Solkoff, Scott. "Directed passion." *The Elder Law Advocate* Spring 2005.

6 Hemness, Emma S. "Reminiscence and reminders." *The Elder Law Advocate* Summer 2008: 2.

The Elder Law Section presents 2011-2012 awards

Rebecca C. Bell is the recipient of the 2011-2012 Member of the Year award, presented by Enrique Zamora.

Enrique Zamora with Scott Selis, recipient of the 2011-2012 Charlotte Brayer Public Service Award, for his dedication to the community.

Twyla Sketchley and Brandon Arkin are presented with awards for their efforts as program co-chairs of the "Elder Law Annual Update and Review Course," which took place on Jan. 13-14, 2012.

Jason A. Waddell receives an award from Enrique Zamora for outstanding service as program chair of the Mentor Committee's "Tricks of the Trade" 2011-2012.

Enrique Zamora, 2011-2012 section chair, passes the gavel to Twyla Sketchley, our 2012-2013 section chair.

Enrique Zamora shows his appreciation for Arlee Colman, our Florida Bar program administrator.

Other recipients of the 2011-2012 annual awards include:

Special recognition of the program co-chairs of the CLE "All Day VA" held Sept. 16, 2011: Jack Rosenkranz, Patricia T. Fuller, Victoria Heuler and Susan King

Special recognition of Carolyn H. Sawyer for outstanding service in co-hosting with the Office of the Attorney General the "Tools of the Trade" series 2011-2012

Keeping up with change in elder law

by Twyla Sketchley

On June 1, 2012, the Elder Law Section held a long-range planning meeting to address changes to the practice of elder law and to the section. The goal was to develop a plan to move the section and its membership forward in this ever-changing professional environment. Members of the planning group had the impossible task of addressing everything from changing the section's name and increasing the prominence of the section in legislative advocacy to changes such as making the section's website more user-friendly and improving explanations in the budget. The leadership of the section will spend the next year implementing the resulting plan.

That plan, however, could not address all the changes that will be coming to the practice in the next year or two. Many major changes will affect the section and its members, their clients and their practices. We must stay abreast of these changes and work together to ensure that we transition as smoothly as we can. One of the greatest benefits of being an active member of the section is the access to the collective knowledge, experience and wisdom of our members to help us in moving through sometimes difficult changes.

One of the first changes lawyers will face this year is the implementation of e-filing and e-service in all state courts. Fla. Stat. § 28.22205 (2011); Fla. S. Ct. Opinion SC11-399; Fla. S. Ct. Corrected Order SC10-2101. For lawyers that work in federal court, this transition may not be difficult, but for those attorneys that practice only in state courts that have not had a history of e-filing, such as probate courts, this transition may be more difficult than anticipated. The Florida e-filing portal can be found at *https://www.myflcourtaccess.com*. Local clerks and The Florida Bar are making every effort to assist attorneys in this transition by creating training for attorneys and publishing repeated notices of these changes. If you find tips, trainings or issues that would benefit all members, the section encourages you to share those with your fellow members.

Another significant change that will come this year and next to the practice of elder law will be the implementation of Florida's Medicaid reforms that place all Medicaid recipients, except those that are part of the Medicaid waiver administered by the Agency for Persons with Disabilities, into state-contracted, private managed care organizations. The first group of Medicaid recipients to be placed into managed care will be recipients receiving and needing long-term care services. Managed care organizations will be paid a capitated rate to provide long-term care, with the goal of keeping recipients in the community and out of institutions. These reforms will require elder law attorneys to learn a new system of service delivery, how to navigate expected waiting lists, how to challenge adverse decisions made by private companies as well as by government agencies and how to explain this new system and its pitfalls to clients and potential clients. While a few members have started working on this information, more assistance is needed. Section members are encouraged to join the Medicaid/Government Benefits Committee to assist in this transition.

Twyla Sketchley

Message from the chair

Another change coming to elder law is the impact on clients and their families of the Affordable Care Act (ACA), the vast majority of which has been upheld by the Supreme Court in *National Federation of Independent Business et al. v. Sebelius, Secretary of Health and Human Services, et al.* Elder law attorneys will have to learn the timeline of implementation for the ACA so they can advise clients on how and when to take advantage of its provisions. They will also need to determine how the State's refusal to implement or participate in portions of the ACA will impact health care availability to some clients and what federal fixes may be available to patch the holes created by the State's lack of participation. This will take as much attention to detail and study as did learning the changes to Medicaid brought on by the Deficit Reduction Act of 2006. The section needs members to assist in the creation of CLE and consumer materials to educate members and the public on the benefits and burdens of the ACA.

There may also be significant changes to the eligibility requirements for VA pension. A recent GAO report outlined various abuses of VA pension as well as detailed tactics used by benefit planning companies that prey on vulnerable veterans using the promise of VA pension qualification to extract high fees. This report and its recommendations have spawned proposed legislation that would create a transfer penalty for those that transfer assets to obtain VA pension as well as other changes to further restrict eligibility for VA pension. Section members interested in or working with VA benefits are encouraged to join the Veterans Benefits Committee to stay abreast of this ever-changing area of elder law.

This short list of coming changes is only a small part of what the section and its members will confront over the next year. One of the Elder

continued, next page

From the chair
from preceding page

Law Section's goals is to assist its members in becoming aware of and addressing these and many other small and large changes. Through the collective wisdom, intellect and experience of the section's membership, the section will have member-written articles in *The Advocate*, will provide information through its "Tricks of the Trade" mentoring calls, will develop CLE to educate members on substantive changes in the law, will expand committee projects to tackle these issues and many others and will post additional information to the section's website. This collective intellect, wisdom and experience and the resulting information provided to members is just one of the benefits of being an active section member. I hope to see many of you working on projects and attending events this coming year. With your participation, the Elder Law Section will continue to be the robust and useful organization you have come to expect.

For Your Practice

Marketing your practice, Keeping it simple

by Al Rothstein

With social media madness, cable news talking (or screaming) heads and your busy schedule, it can be daunting to develop an effective marketing effort for your practice. Here are some basic steps:

Define your audience

Are you reaching those who will refer business, going directly to potential clients, or both? If you are after referral sources, develop a list of their organizations. Examples include members of a Bar section, a social workers organization or a geriatric care association.

If you are marketing directly to potential clients, one target can be civic organizations. An attorney recently told me she received 16 legitimate leads from one Rotary presentation we scheduled. This is, of course, much higher than normal; sometimes results will take a long time.

Develop your message

This should be done toward the beginning of your campaign. If your message isn't effective, your presentation will be a waste of time. The most effective messages tell the audience not merely what you do, but what you can do *for them*.

Reach your audience

Once your message has been developed and you have the contacts for the organizations you want to reach, it is time to schedule appearances. You are probably already doing this by presenting speeches and seminars. You can also ask the organizations about opportunities to conduct conference sessions and to write articles.

Reinforce your message

After you speak and leave your business material with audiences, they will check out your website. Does your site reinforce your message? Is your site's content understandable to your audience?

This is where social media sites like Twitter and Facebook can help reinforce your message. One key is to develop quality followers, those who receive your social media messages. Commenting on news topics and sending consumer tips work effectively, but they must be sent consistently.

Measure results

Every few months, examine whether your efforts are producing results. Simplicity and patience are important. Long-term results require a long-term effort.

Al Rothstein *is president of Al Rothstein Media Services, which specializes in marketing and public relations for law firms and associations. He has been working with clients in Florida and around the country for 20 years. You can reach him at 866/636-3342 or elderissues@rothsteinmedia.com. Also, you can get free marketing and PR tips by following him on Twitter @MediaAl.*

For Your Practice

Application deadline nears for 12 Florida Bar board certification areas

Applications due Aug. 31, 2012

Florida Bar members interested in board certification must have applications postmarked by Aug. 31, 2012, for 12 of Florida's 24 legal specialization areas: admiralty and maritime law, adoption law, appellate practice, aviation law, civil trial, education law, **elder law**, immigration and nationality, international law, labor and employment law, marital and family law and tax law. Applications are available on The Florida Bar's website at *www.floridabar.org/certification*.

Board certified attorneys are the only Florida lawyers allowed to identify themselves as "specialists" or "experts" or to use the letters "B.C.S." to indicate Board Certified Specialist when referring to their legal credentials.

"The Florida Bar's board certification program is one of the best in the country," says Florida Bar President Gwynne A. Young of Carlton Fields in Tampa. "It assists the public in locating lawyers who have demonstrated their level of skill, excellence and commitment to professionalism."

Board certification is The Florida Bar's highest evaluation of attorneys' competency, experience and professionalism in areas of law approved for specialization by the Supreme Court of Florida. Board certified lawyers are legal experts dedicated to professional excellence, and attorneys who become board certified are evaluated as to their character, ethics and reputation for professionalism in the practice of law. Florida offers 24 specialty areas for board certification, more than any other state. The Florida Bar maintains a free, online directory of board certified lawyers by specialty area and city at *www.floridabar.org/certification*. About 4,500 of Florida's 91,000 lawyers have earned board certification.

A lawyer who is a Florida Bar member in good standing and who meets the standards prescribed by the Florida Supreme Court may become board certified in one or more of the 24 certification fields. Minimum requirements for board certification are listed below; each area of certification may contain higher or additional standards.

- A minimum of five years in law practice
- Substantial involvement in the field of law for which board certification is sought
- Satisfactory peer review from other lawyers and judges to assess competence in the specialty field as well as character, ethics and professionalism in the practice of law
- Completion of the board certification area's continuing legal education requirements
- A passing grade on the examination required of all applicants or satisfaction of strict criteria to exempt the exam

Board certification is valid for five years, during which time the attorney must continue to practice law and attend Florida Bar-approved continuing legal education courses. Recertification requirements are similar to those for initial certification. Not all qualified lawyers are certified, but those who are board certified have taken the extra step to have their competence and experience evaluated.

Applications for Florida's additional board certification areas are due Oct. 31. Board certification applications, requirements and staff contact information are available at *www.floridabar.org/certification.*

You've got email

Service by email is mandatory beginning Sept. 1

by Brandon Arkin

On June 21, 2012, the Florida Supreme Court adopted Florida Rule of Judicial Administration 2.516 (Service of Pleadings and Documents), implementing mandatory email service for all cases in Florida and the corresponding amendments to conform the existing court rules to new Rule 2.516, including the probate rules. (It is important to note that documents served by formal notice or required to be served in the manner provided for service of formal notice are not required to comply with Rule 2.516.)

Email service will be mandatory for attorneys practicing in the civil, probate, small claims and family law divisions of the trial courts, as well as in all appellate cases, when the rule amendments take effect on Sept. 1, 2012, at 12:01 a.m. (Email service in criminal, traffic and juvenile matters is not mandatory until Oct. 1, 2013.)

Rule 2.516 is modeled after Florida Rule of Civil Procedure 1.080 (Service of Pleadings and Papers) and includes many of the same provisions and requirements for service. The new rule requires that all documents required or permitted to be served on another party must be served by email.

Rule 1.080 Service of Pleadings and Papers has been amended and is now titled Service of Pleadings, Orders and Documents. The entire rule has been stricken and now reads: "Every pleading subsequent to the initial pleading and every other document filed in the action must be served in conformity with the requirements of Florida Rule of Judicial Administration 2.516."

A line-by-line analysis of all the amendments and rule changes is beyond the scope of this article. However, I will attempt to give you the highlights and information you need to know to comply with the rule change.

When a lawyer makes an appearance in a case, the lawyer is required to designate a primary email address, and may designate up to two secondary email addresses, for receiving service. Thereafter, the lawyer must be served by email. If a lawyer does not designate an email, the email address listed on The Florida Bar's website will be considered a valid email for service.

Specific rules must be followed when serving via email. The email subject line must state in all capital letters SERVICE OF COURT DOCUMENT followed by the case number of the pleading. The pleading must be attached in PDF format. The attached pleading and email together may not exceed 5 megabytes. If the email and attachment exceed 5 megabytes, the attachment must be separated into separate emails and labeled sequentially in the subject line. The body of the email must identify the court in which the proceeding is pending, the case number, the title of each document served with the email, the name of the initial party on each side and the sender's name and telephone number. Service via email is deemed complete when the email is sent and is deemed served on the date it is sent. If the sender learns that the email did not reach the address of the person to be served, the sender must immediately send another copy by email, or by a means authorized by subdivision (b)(2) of this rule. Email service is treated as service by mail for the computation of time.

No service need be made on parties against whom a default has been entered, except that pleadings asserting new or additional claims against them must be served in the manner provided for service of summons.

There are exceptions to the new rule. An attorney may file a motion demonstrating that the attorney has no email account and lacks access to the Internet at the attorney's office. The court may excuse the attorney from the requirements of email service. Service on and by an attorney excused by the court from email service must be by the means provided in subdivision (b)(2) of this rule. A pro se litigant may designate a primary email address for service; however, pro se litigants are not required to do so. If a pro se litigant does not designate an email address for service in a proceeding, service on and by that party must be by the means provided in subdivision (b)(2) of this rule.

Subdivision (b)(2) provides

> in addition to, and not in lieu of, service by email, service may also be made upon attorneys by any of the means specified in this subdivision. Service on and by all parties who are not represented by an attorney and who do not designate an email address, and on and by all attorneys excused from email service, must be made by delivering a copy of the document or by mailing it to the party or attorney at their last known address or, if no address is known, by leaving it with the clerk of the court. Service by mail is complete upon mailing.
>
> Delivery of a copy within this rule is complete upon:
>
> (A) handing it to the attorney or to the party,
>
> (B) leaving it at the attorney's or party's office with a clerk or other

person in charge thereof,

(C) if there is no one in charge, leaving it in a conspicuous place therein,

(D) if the office is closed or the person to be served has no office, leaving it at the person's usual place of abode with some person of his or her family above 15 years of age and informing such person of the contents, or

(E) transmitting it by facsimile to the attorney's or party's office with a cover sheet containing the sender's name, firm, address, telephone number, and facsimile number, and the number of pages transmitted. When service is made by facsimile, a copy must also be served by any other method permitted by this rule. Facsimile service occurs when transmission is complete.

(F) Service by delivery after 5:00 p.m. must be deemed to have been made by mailing on the date of delivery.

Changes specific to the Florida probate rules

Rule 5.041 has been amended to provide: "For purposes of this rule an interested person shall be deemed a party under rule 2.516." Rule 5.340 regarding inventory has been amended, and the following language "The personal representative shall file proof of such service" has been stricken. The committee note provides: "last sentence of subdivision (d) is deleted to remove duplicative requirement of filing a proof of service for a document which includes a certificate of service as provided in Fla. R. Jud. Admin. 2.516. If service of the inventory is by service in the manner provided for service of formal notice, then proof of service should be filed as provided in rule 5.040(a)(5)." Rule 5.342 regarding inventory of safe-deposit box provides similar language.

I hope this article provided you with enough information to get familiar with the new rule requiring service by email. I encourage you to read the full opinion found at *www.floridasupremecourt.org/decisions/2012/sc10-2101.pdf*. The Florida Bar will provide complimentary education on the mandatory email service requirements prior to the effective date.

Brandon Arkin *is an associate at the Rosenkranz Law Firm in Tampa, Fla. His area of practice consists primarily of elder and family law. He is chair of the Law School Liaison Committee, vice chair of the Mentoring Committee and the Elder Law Section's liaison to the Family Law Section of The Florida Bar.*

COMMITTEE REPORTS

Financial Products Committee

Jill Burzynksi, chair

The Financial Products Committee recently discussed the disbarment of an attorney/financial planner and the implications of that opinion on lawyers choosing to perform both services. Greg Martoccio represented the committee in the elder exploitation workshop in June.

Guardianship Committee

Sponsored by Wells Fargo

Carolyn Landon and Melissa Barnhardt, co-chairs

The Guardianship Committee was hard at work during the year and finalized its draft legislative position, a white paper and a proposed bill that would amend Florida Statutes, Chapter 744.3215, to include the ability to remove the "right to bear arms." The committee obtained the Elder Law Section Executive Council's approval to submit the proposal to The Florida Bar.

In March, the Elder Law Section filed comments in support of the RPPTL Section's application to the Supreme Court's Rules Review Committee (SCRRC) and in opposition to Judge Perry's response in regard to the 9th Circuit Administrative Order that was signed in September 2011. We recently received the notice that the recommendations of the SCRRC were extended (motion for continuance granted) beyond the normal 30 days to July 9. We will keep everyone posted on the results.

The committee is also following the appeal of a recent finding in the 17th Circuit declaring 744.331(4) unconstitutional regarding automatic dismissal of a case if a majority of examining committee members state there is no incapacity. The committee will continue exploring the discussion on whether "undue influence" should also be added as a basis for incapacity.

Our committee will have bimonthly conference calls at 8:30 a.m. on Fridays on the following dates: Sept. 21 and Nov. 16. Additional dates will be announced for 2013 at a later time. The call-in procedure for participants is: At the specified date and time, dial 1-888/376-5050 and enter pin 7203521985 (you will be put on hold if the chair has not joined). If you have a problem, dial * (star) and 0 (zero) and an operator will assist you. Please feel free to email the co-chairs, Carolyn Landon at *carolyn@landonlaw.net* and Melissa Lader Barnhardt at *melissa.l.barnhardt@wellsfargo.com*, if you have other areas of interest that you would like the committee to consider or if you would like to join the committee.

Committees keep you current on practice issues

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

Monitoring new developments in the practice of elder law is one of the section's primary functions. The section communicates these developments through the newsletter and roundtable discussions, which generally are held prior to board meetings. Each committee makes a presentation at these roundtable discussions, and members then join in an informal discussion of practice tips and concerns.

Committee membership varies from experienced practitioners to novices. There is no limitation on membership, and members can join simply by contacting the committee chair or the section chair. Be sure to check the section's website at www.eldersection.org for continued updates and developments.

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Elder Law Section proposes amendment to ESS policy manual regarding qualified income trusts

by Leonard E. Mondschein

The Elder Law Section of The Florida Bar, through the Unauthorized Practice of Law Committee, chaired by John Frazier, J.D., LL.M, has proposed an amendment to the Department of Children & Families' (DCF) ESS Policy Manual regarding the procedure for caseworkers to review qualified income trusts (QITS) in order to determine whether or not they qualify under the law.

ESS Policy Manual, Appendix A-22.1 Step 4, now requires caseworkers to submit QITS along with the name of the person who created the QIT, and the individual's authority, to district legal counsel (DLC) for review, if he or she is not an attorney licensed to practice law in the state of Florida. If the QIT is submitted by an attorney licensed to practice law in this state, it is automatically approved. Since the manual recognizes a class of QIT submissions by non-licensed attorneys, it is arguably tantamount to condoning the unauthorized practice of law (UPL).

After discussions among the members of the UPL Committee and the Public Policy Task Force, it was decided that proposed language should be drafted to address the drafting of QITS by persons unlicensed to practice law in the state of Florida. This would be in the best interests of the public, DCF and the Elder Law Bar. Len Mondschein, J.D., LL.M., CELA, CAP, past chair of the Elder Law Section, volunteered to draft the proposed language along with a memorandum explaining the reason for the amendment to the manual. Suggested language by Lauchlin Waldoch, CELA, a past chair of the Elder Law Section, and Jana McConnaughhay, administrative chair of the Elder Law Section, was incorporated into the final amendment. At the Executive Council meeting in June, it was voted on and approved for submission to DCF by Twyla Sketchley, chair of the Elder Law Section, as a recommended change to the ESS Policy Manual.

Below is the proposed language and memorandum:

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Amendment to Appendix A-22.1 Step 4 Regarding Qualified Income Trusts

The Florida Bar UPL Department (see May 13, 2009, letter to Linda Chamberlain) and the Elder Law Section of The Florida Bar take the position that the establishment of a qualified income trust, along with the advice needed to properly execute and administer this trust, constitutes the practice of law. Furthermore, the Department of Children & Families has instructed their caseworkers not to distribute redacted qualified income trusts to applicants or those applying on their behalf, as this would constitute the condoning of the unauthorized practice of law.

Since it is in the best interest of the people of Florida, the Department of Children & Families, as well as The Florida Bar (both the UPL Department and the Elder Law Section) to have qualified income trusts properly drafted by those who have the requisite education, training and licensing, it is hereby requested by the chair of the Elder Law Section of The Florida Bar, Enrique Zamora, that Appendix A-22.1, Step 4, second paragraph be changed to read:

> If the income trust was not set up by an attorney licensed to practice in the state, the eligibility specialist shall not accept the trust as it would condone the unauthorized practice of law, and return the trust to the applicant or his/her authorized representative with instructions to seek proper legal counsel to set up the trust. This paragraph shall not apply to a trust prepared by the applicant or a family member without the assistance of a non-attorney. The eligibility specialist must ask the applicant who actually prepared the trust.

It is the position of the Elder Law Section of The Florida Bar that this amendment to the ESS Policy Manual is in the best interest of the public, as well as the Department of Children & Families, in the orderly administration of the state's Medicaid program.

Notwithstanding the above, the Elder Law Section of The Florida Bar recognizes every individual's legal right to act on his/her own behalf ("pro se representation") in legal matters. However, it is both against Florida law and a violation of Florida Bar rules for a non-attorney to act as an attorney for other individuals.

SECTION NEWS

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While it is uncertain whether or not DCF will amend the ESS Policy Manual as recommended, it should be clear to all concerned that the preparation of a qualified income trust constitutes the practice of law as opined by the Standing Committee for the Unauthorized Practice of Law of The Florida Bar in its letter to Linda Chamberlain, past chair of the Elder Law Section, on May 13, 2009. It therefore should follow that a state government agency (i.e., DCF) should not accept QITS drafted and submitted by persons who are unlicensed to practice law in the state of Florida. This amendment is not intended to force DCF caseworkers to police the unauthorized practice of law but rather to stop condoning it as if it is business as usual. As all state government agencies serve the public, it is a disservice to allow persons who are unlicensed to practice law in the state of Florida to draft and submit any legal documents to a state government agency.

Leonard E. Mondschein, Esq., *is a past chair of the Elder Law Section of The Florida Bar. He is board certified in elder law and wills, trusts and estates. He is a Certified Elder Law Attorney (CELA) by the National Elder Law Foundation. He serves as chair of the Practice Development / Practice Management Section of NAELA. He writes this article on behalf of the Unauthorized Practice of Law Committee and the Public Policy Task Force.*

Member news

Nicola J. Boone Melby rejoins Stuart law firm

McCarthy, Summers, Bobko, Wood, Norman, Bass & Taylor PA is pleased to announce that Nicola J. Boone Melby, Esq., has rejoined the firm as a shareholder. Melby is AV rated by Martindale Hubbell, certified by The Florida Bar an elder law specialist (1999) and certified by the National Elder Law Foundation as an elder law specialist (2011). She graduated summa cum laude from Stetson College of Law. Melby concentrates her practice in the areas of elder law, Medicaid planning, long-term care planning, estate planning, wills and trusts, special needs trusts, probate and guardianships. She is chair of the North Carolina chapter of Elder Law Attorneys and also has served on the board of directors for the Florida Academy of Elder Law Attorneys. Melby has served as the continuing legal education chair for the Elder Law Section and is a past officer of the section.

Two long-time members retire

Elder Law Section members **Patricia I. (Tish) Taylor** and **Sheri Lund Kerney** recently retired from the active practice of law. Both women are well known for their service to the section and for their many contributions to the excellent practice of elder law in our state.

Taylor is perhaps best known within the Elder Law Section for her work on *The Elder Law Advocate*, which she served as editor for 10 years. Nikki Melby recalls, "Tish began practicing elder law exclusively in 2002 and immediately gave generously to this section of her time, her talent and her not insubstantial intellect. She will be sorely missed by all, and we wish her our very best!"

Kerney, an elder law attorney in private practice in Orlando, was admitted to The Florida Bar in 1978. She devoted her practice to elder law beginning in 1988. Emma Hemness had this to say about Kerney: "She is one of the best elder law attorneys that there will ever be, both in character and in concern for her clients. Her ethical standards should be emulated. Her wisdom should be strived for. Her desire to always be behind the scenes, never putting her interests before others, should be imitated."

We wish Tish and Sheri well in their retirements.

Now is the time to consider making significant gifts

by Michael B. Axman and Nancy K. Watkin

There has never been a better time for gift tax planning. Today's unique combination of low asset values, all-time low interest rates and high gift and generation skipping transfer (GST) tax exemptions makes 2012 an exceptional time to implement gift tax planning to shift appreciation and value from taxable estates. For the remainder of 2012, the unified federal estate, gift and GST tax exemption is $5,120,000 per person ($10,240,000 for a married couple), with the top marginal gift and estate tax rate capped at 35 percent. While the current tax rules could conceivably be extended past 2012, without remedial federal legislation, these generous tax provisions will expire on Dec. 31, 2012, and the current $5,120,000 estate, gift and GST tax exemptions will be reduced to $1 million, with top marginal tax rates of 55 percent.

In addition to shifting future appreciation of assets to the next generation, the current gift tax exemption could permit $5,120,000 of gifts or transfers made by an individual to result in $4,120,000 of tax free gifts (assuming Congress does not include a "clawback" provision in future legislation so that exempt gifts made in 2012 in excess of the estate tax exemption in effect at the time of the donor's death are effectively never taxed). Gifts or transfers of $10,240,000 by a married couple could result in $8,240,000 of tax free gifts (subject to the same assumption). The same transfers made in 2013 after expiration of the current exemptions would incur an immediate transfer tax of $2,266,000 for an individual or $4,532,000 for a married couple. Available planning techniques that result in even greater value shifts may be curtailed under the Obama Administration's 2013 revenue proposals (see below).

To the extent the expanded exemptions are not used this year, there is risk that they will be lost forever. Numerous proposals have been brought before Congress to revise the estate, gift and GST tax exemptions, but it is unlikely any legislation will be adopted before determination of the outcome of the presidential election and the composition of Congress. However, the continuing debt crisis makes extension of the current exemptions appear unlikely for a cash-strapped federal government. The Obama Administration's 2013 revenue proposals include setting the gift tax exclusion at $1 million, the estate and GST tax exemptions at $3.5 million and the top marginal tax rate at 45 percent. These proposals also contain important changes that would severely impact the ability to leverage gift and GST tax exemptions, including 1) reducing the use of valuation discounts for minority interests in family-controlled partnerships, LLCs and other entities, which would eliminate or curtail estate and gift tax benefits afforded by family limited partnerships (FLPs) and sales to grantor trusts; 2) requiring a minimum 10-year term for grantor retained annuity trusts (GRATs) and disallowing zeroed-out GRATs; 3) coordinating the grantor trust income tax rules with the gift and estate tax rules to result in the inclusion of a grantor trust in a deceased grantor's gross estate and imposing gift tax on distributions from grantor trusts to persons other than the grantor; and 4) limiting the term of generation-skipping dynasty trusts to 90 years.

Based upon the above, it is recommended that transactions involving structured gifts be considered prior to year-end and prior to any tax changes, since it is unlikely that new legislation will impact estate planning that is in place prior to the date of enactment. Now is the time to revisit estate plans to take advantage of potential gift tax planning opportunities.

Michael B. Axman *is a founding member of Nash Axman Watkin PLC, a boutique tax and trusts and estates law firm located in Coral Gables, Fla., where he concentrates his practice on tax and business planning, tax controversies, estate and gift tax matters, estate planning and probate and trust administration. He received his LL.M. in taxation (1987) and J.D. (1983) from the University of Miami School of Law and has held an active license as a Certified Public Accountant in Florida since 1982.*

Nancy K. Watkin *is a founding member of Nash Axman Watkin PLC, where she concentrates her practice in the areas of estate planning, probate and trust administration and tax. She received her LL.M. in estate planning (2005) and J.D. (1980) from the University of Miami School of Law.*

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Law practice management: Transitioning into elder law

Many of our members have roots in other areas of the law and may be contemplating a transition into elder law practice. The section supports and welcomes elder law practitioners, so we've asked two of our members for some pointers based on their own experiences in transitioning into elder law.

Jana McConnaughhay

Rudy Suarez

What events prompted you to transition into the practice of elder law?

Jana McConnaughhay: I had been a practicing workers' compensation defense attorney for 10 years and had recently become board certified. The practice was fine, and was a way to make a living, but I wanted a more fulfilling and challenging way to spend my work days. I began taking on pro bono guardianship cases at the same time a large case required a special needs trust, and I was hooked.

Rudy Suarez: I came from a personal injury background, primarily dealing with nursing home negligence cases. All or most of my cases had an "elder law" element, whether it was opening an estate or a guardianship to bring the claim on behalf of a nursing home resident and/or when the cases were resolved. These individuals usually received Medicaid or other types of public benefits that required special needs or Medicaid planning to ensure they would not lose those benefits. I usually hired outside counsel to assist me in handling those aspects of the case, and I would work closely with clients and outside counsel to ensure that clients were getting the proper services. I felt it was critical, as a personal injury attorney, to provide my clients with those services. As I became more involved with those aspects, it became apparent that you needed a special set of skills and knowledge to effectively practice in the elder law arena, so I started seeking out more and more of those cases. When I decided to leave my previous firm, I had developed numerous relationships with other personal injury attorneys and chose to offer those specialized services to them.

What steps did you find successful?

JM: I began to attend every CLE event, both through the section and through NAELA (National Academy of Elder Law Attorneys), that I could get to while maintaining my existing practice. I continued to take on pro bono cases within the practice area and began to get the word out through friends and colleagues that I was available for things like simple planning or guardianships. My most successful step, though, was approaching an attorney I had met through a case (Lauchlin Waldoch) at a NAELA conference and re-introducing myself. We began working together within months of that overture, and her generosity in sharing her work and her expertise accelerated a slow move from workers' compensation to a full transition before the year was out.

RS: I had a mentor prior to my going out on my own. I worked closely with experienced elder law attorneys who taught me how to effectively practice in this area. I also attended numerous elder law CLE courses to get a better understanding of this specialized area. Finally, I did not take on more than I could effectively handle. If I was approached with a case I did not feel qualified to handle on my own, I would bring in co-counsel to assist me with the matter.

If you had to do it all over again, what are the first three things you would do?

JM: First, attend those CLEs and gather a library of materials. I had to hear some of the information over and over before it sunk in, and I needed those materials on a daily basis for years. Second, join and become active in the Elder Law Section. The information and contacts available through that involvement have been invaluable. Third, join AFELA (Academy of Elder Law Attorneys) and learn from my colleagues on its listserv.

RS: Take elder law courses and try to find a mentor in the area.

What prior skills did you find helpful?

JM: Learning how to organize and stay on top of the heavy caseload required to maintain a successful workers' compensation practice has been hugely helpful in keeping track of cases and keeping clients happy with the progress of a busy elder law practice. I learned the ability and importance of billing, which has also been a great skill to pull from now that Lauchlin and I have our own firm.

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RS: As an elder law attorney, you are a lot more than just a lawyer. You truly are a "counselor" to your clients. Clients are usually coming to you with a very difficult family issue that requires not only legal expertise, but compassion. Many of your clients are truly "lost" in the elder law area and are seeking out not only legal solutions, but also delicate family considerations. Each case is different, involving different "dynamics," and as a lawyer you have to balance between your client's desires, ethical considerations and specific family dynamics. Aside from legal skill, this area requires compassion and patience.

How important is the attendance of CLEs with regard to elder law?

JM: It's vital to maintaining a successful elder law practice.

RS: The attendance of CLEs is extremely important as this is still a relatively young area of the law and constantly changing.

Jana McConnaughhay *is a principal in Waldoch and McConnaughhay PA in Tallahassee, where she practices elder law on a full-time basis. She is board certified in elder law (2009), and was previously board certified (2002-2008) in workers' compensation law. She is administrative chair of the Elder Law Section of The Florida Bar and serves as an elected member of the board of directors of the Academy of Elder Law Attorneys and the Tallahassee Bar Association. She has a B.A. in accounting from Furman University and a J.D. from the Vanderbilt University School of Law.*

Rodolfo "Rudy" Suarez, Jr., *is a founding member of Suarez & Taylor, Attorneys at Law, established in September 2010. The firm concentrates primarily in the areas of probate, guardianship, elder law, estate planning, special needs trusts and probate and guardianship litigation. Prior to establishing Suarez & Taylor, he was the founding member/partner of Rodolfo Suarez, Jr., PA, formed in April 2007, concentrating in the same practice areas. After being in practice for over 13 years as a personal injury attorney, and prior to establishing Rodolfo Suarez, Jr., P.A., he was of counsel with Solkoff & Associates PA in the areas of probate, guardianship, special needs planning and Medicaid lien resolution. As a personal injury attorney, he was an associate and then a partner in the personal injury firm of Fuller & Suarez PA for over 11 years. As a personal injury trial lawyer, he represented victims of medical malpractice and nursing home negligence/abuse as well as plaintiffs in a variety of personal injury cases.*

Written defenses can be timely filed more than 20 days after service of formal notice under Florida Probate Rule 5.040

by Alex Cuello

"Formal notice is the method of service used in probate proceedings and the method of service of process for obtaining jurisdiction over the person receiving the notice."[1] As compared to "[i]nformal notice [which] is the method of service of notice given to interested persons entitled to notice when formal notice is not given."[2] Rule 5.040(a)(1), titled "Formal Notice," states that failure to file written defenses within 20 days after service of formal notice *may* result in a judgment or an order for the relief demanded in the pleading or motion without further notice.[3] This rule also states that "[w]hen formal notice is given in lieu of informal notice, that notice does not modify any time period otherwise specified by statute or these rules."[4] In interpreting the application of Rule 5.040(a)(1), the appellate courts have provided significantly more than 20 days in which to timely file written defenses.

The First District Court of Appeal has held that formal notice is neither a statute of limitation nor a mandatory non-claim provision.[5] "Florida courts which have considered the question [of striking untimely written defenses] all treat the rule as a procedural one."[6] In *Rocca v. Boyansky*, 80 So.3d 377 (Fla. 1st DCA 2012), the Second District Court of Appeal reversed the trial court's admission to probate of a will filed under a petition for administration served by formal notice. The respondent in *Rocca* received formal notice on Aug. 31, 2009, and was granted an extension until Dec. 15 to file an answer. On Nov. 13, a full month in advance, the matter was set for hearing on Dec. 22. Seven days late and 30 minutes before the hearing, the respondent filed his answer. In finding the answer was timely filed, the Second District ruled that so long as the answer was filed before the hearing, the respondent was not barred from participating in the hearing or asserting defenses to the petition.

In *Long v. Willis*, 36 FLW D1811a (Fla. 2nd DCA 2011), the decedent died intestate survived by three minor children to whose mother he was not married. The decedent's sister filed a petition for administration and served formal notice on the minors' mother. No pleadings were filed by the minors' mother. After the 20-day period to file an answer and defenses, a hearing was held wherein the court entered an order appointing the decedent's sister as personal representative. In the period between the probate court's entry of the order appointing the personal representative and the issuance of the letters of administration, the minors' mother retained counsel, who filed an objection to the petition for administration and appointment of the personal representative. The appellate court reversed, holding that the probate court erred in ruling that the minors' mother was time barred from challenging the appointment of the personal representative. The appellate court held that "although Florida Probate Rule 5.040(a)(2) provides that where an interested person on whom formal notice is served does not serve written defenses within twenty days, the probate court may consider the pleading ex parte, Florida courts treat this rule as merely procedural; it is 'in no sense' a statute of limitation or a mandatory non-claim provision." *Id.* (citing *Tanner v. Estate of Tranner*, 476 So.2d 793, 794 (Fla. 1st DCA 1985)). "Applying this reasoning in *Tanner*, the First District held that where the decedent's beneficiaries filed a joint answer to the petition for administration asserting defenses five days after the time for answers had expired but before the hearing on the petition for administration and the order granting letters, the answer was timely filed." *Id.*

In *Tanner v. Estate of Tanner*, 476 So.2d 793 (Fla. 1st DCA 1985), the issue was "whether appellants' written defenses were timely filed, after formal notice under the Florida Probate Code, where the defenses were filed more than twenty days from service of the notice, but before the order admitting the challenged will to probate and issuance of letters." *Id.*, at 793. In reversing the probate court's orders admitting the will to probate and granting letters of administration, the appellate court, relying on *Nardi v. Nardi*, 390 So.2d 28 (Fla. 3rd DCA 1980), held that "the requirement of Section 731.301(1)[7] and Rule 5.040(a)(1), Florida Rules of Probate and Guardianship Procedure … —that the opponent of a will file defenses to the petition for admission of the will to probate within twenty days of services of the petition—as being merely a procedural rule, and 'in no sense' a statute of limitation or a mandatory non-claim provision. Since the answers were filed before the hearing on the petition for administration and before entry of any order admitting the will and granting letters, they were timely filed and should not have been stricken." *Tanner*, at 794.

Specificity in the pleadings of the relief sought is key for the court to enter "a judgment or order granting for the relief demanded in the pleadings or motion, without further notice."[8] In *Walker v. Bailey*, 37 FLW D1300a (Fla. 5th DCA 2012), the decedent's mother served the father with formal notice of a petition for allocation of

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Written defenses
from preceding page

wrongful death proceeds, alleging she had sustained a "majority of the loss." *Id.* The mother advised the father that a hearing on the petition would be set several weeks later. After the 20-day period passed, without a response from the father being filed, the court entered an order allocating 100 percent of the proceeds to the mother. On appeal the Fifth District Court of Appeal reversed, holding, in part, that the mother's allegation in the petition asserting she had sustained a "majority" of the damages failed to inform the father that she sought 100 percent of the proceeds. Furthermore, the court found that the father was not required to file a response because he had a right to rely on the notice scheduling a hearing on the mother's petition. "The rule does not provide for the entry of a default against a party who fails to respond."[9]

Alex Cuello, Esq., *the principal shareholder of the Law Office of Alex Cuello PA in Miami, has been admitted to practice law in Florida since 1996. He received his B.A. from Florida International University, law degree from St. Thomas University and Master of Laws degree in elder law from Stetson University. His practice focuses on elder law, with an emphasis in the areas of probate administration and litigation, guardianship administration and litigation, estate planning Medicaid planning and Social Security. He is board certified by The Florida Bar as a specialist in elder law, has been published in The Florida Bar Journal and serves on the Executive Council of the Elder Law Section of The Florida Bar.*

Endnotes:

1 Committee Notes, 5.040, Fla.Prob.R.

2 Id.

3 5.040(a)(1), Fla.Prob.R. [Emphasis added.]

4 5.040(d), Fla.Prob.R.

5 *Rocca v. Boyansky*, 80 So.3d 377 (Fla. 1st DCA 2012).

6 Id.

7 Notice. If notice to an interested person or a petition or other proceeding is required, the notice shall be given to the interested person or that person's attorney as provided in the code or the Florida Probate Rules. 731.301, Florida Probate Code.

8 5.040(a)(1), Fla.Prob.R.

9 *Walker v. Bailey*, 37 FLW D1300a (Fla. 5th DCA 2012).

Planning ahead helps ease end-of-life decisions

by Philip M. Weinstein

What can consumers do to ensure their loved ones are treated with dignity? Two things:

1) Plan ahead.

- Make your final wishes known in advance.
- Make purchases and arrangements sooner rather than later. Having plans finalized prior to death prevents family members from having to make those arrangements on the worst day of their lives.

2) Choose a funeral home or a cemetery in the same way you would any other major purchase.

- Consider the provider's reputation
- Ask family and friends which provider they have used in the past.
- Ask family and friends if they would use the same provider again.

Florida has some of the most stringent regulations in the nation. The State of Florida has an active regulatory board for funeral homes, cemeteries and crematories under the Florida Division of Funeral, Cemetery & Consumer Services. The board, which is staffed by state regulators, comprises funeral and cemetery professionals and consumers, ensuring wide-ranging perspective on oversight issues. The board oversees the licensure of facilities and individuals in the profession, the transfer or sale of facility ownership and disciplinary actions against those in violation of state laws and regulations.

The United States General Accounting Office (GAO) conducted a review of cemetery and funeral regulations in December 2011 and found that a majority of state regulators believe there is no need for additional regulation at the federal level. The GAO report cites that 88 percent of states have regulations for cemeteries, and 95 percent have the same for funeral homes.

Philip M. Weinstein *is chair of the Death Care Committee of the Elder Law Section, where he is an honorary life member. A licensed funeral director in the state of Florida since 1969, he is part of the Dignity Memorial Network of Funeral, Cemetery and Cremation Providers with more than 180 locations in Florida and approximately 2,000 in North America. He can be reached at 877/554-7878. He is a great resource and is available 24/7 to assist ELS members. He writes this article on behalf of the Death Care Committee.*

Data mining the client's income tax return

by Michael A. Lampert

Do you routinely ask for a copy of your client's income tax return (all pages) when doing initial or updated estate planning? How about when doing Medicaid planning? If you do not, you should consider asking for a copy. Why?

A tax return contains a wealth of information, so much so that I have been retained by divorce lawyers and fiduciary litigators to assist them in crafting discovery requests and deposition questions based on what I see (and do not see) on tax returns.

What can be gleaned from a tax return for a typical elder client, even one of more modest means? Some of the basics include:

Income

More income. Does the client have more income than is showing on the return? The bottom of the first page lists the client's adjusted gross income. This number is often not the client's real income. Look for non-taxed Social Security and tax-exempt income. Is there income earned in a pension plan or an IRA that is not being paid out and, therefore, does not show on the tax return? Does the client tell you about his or her $600,000 of investment grade assets, yet the return shows only $6,000 in investment income? Why? Is the investment account invested for growth? Is the broker doing a less than good job?

Many times clients do not realize how much income they really have. Sometimes clients can generate more income, if needed, by shifting their investment portfolios from growth to income-producing investment assets.

Less income. Does the client have less income than he or she realizes? While the adjusted gross income may be high, did it result from sale of a capital asset, such as a second home? Is it from taxable distributions from an IRA or an annuity, where the client thinks the distribution is all income but instead the client is receiving and perhaps spending principal?

Continuing income. Will the income continue? Sometimes you will see payments from promissory notes, the sale of a client's business, retirement plans, a client's part-time job income, etc. For planning purposes, will the payments continue?

Does it make sense? Do the income numbers and the income sources match what the client told you? Why are wages showing up for a client who has been retired for five years? Is it what is left of a deferred compensation payout? Is it an error by the tax preparer?

Churning and other improprieties. Later in the tax return there may be a schedule listing securities transactions. If there are significant numbers of security transactions, was it a new broker properly (we hope) repositioning assets, or is the broker simply churning the client's assets to generate fees?

Asset List

The return should list the sources of income, such as interest, dividends, K-1 income (from trusts, partnerships and S Corporations), etc. Does the client's asset list provided to you account for all of the items showing on the return? Do these assets need to be re-titled (such as into a living trust)? Is special planning needed for any assets?

Do any of the assets appear to be foreign sourced? Many returns have a Schedule B. At the bottom of the page is a question in small print: "At any time during [the tax year], did you have a financial interest in or signature authority over a financial account (such as a bank account, securities account or brokerage account) located in a foreign country?" with a box to check. If a box is checked "yes," know that special offshore tax and reporting rules apply, and these rules may also apply for any third party trustee and personal representative of the client's estate/trust. If the box is checked "no" and there are offshore assets, tax counsel should be obtained.

Schedule E should list investment business/real estate. As with securities and other assets, these assets need to be addressed in any planning and should match the information provided to you by the client.

Other considerations

What address does the client use on the return? Where is the accountant located? It is not uncommon for a Florida "snowbird" client to continue to use a non-Florida CPA. While this is not determinative of residency, listing the client's northern address on the tax return is not helpful in establishing that he or she no longer lives in a suburb of Philadelphia, in a state with an individual income tax.

Estate administration

By the way, much of the above applies when handling an estate administration. Look at the decedent's last tax return(s). The information should match the information you have been provided and have discovered. Even the IRS will look at a decedent's pre-death income tax return when reviewing an estate tax return. Why? To see if it appears that assets may have been improperly omitted from the estate tax return.

The above just scratches the surface of what can be data mined from a tax return. You do not need to have any special tax expertise to look for basic information on the return. Try it and you will likely be surprised by how often you pick up a missed item, an inconsistency with other information you may have been provided by the client or see something that just doesn't seem right.

UPL – The unlicensed practice of law in Florida

by John R. Frazier

The unlicensed practice of law, commonly referred to as UPL, occurs when a person who is not a licensed attorney engages in the practice of law.[1] UPL can happen in any area of law; however, there is an escalating facet of UPL of particular importance to elder law clients.

The area of Medicaid planning often involves some of the most vulnerable groups of individuals in Florida: elderly individuals and individuals with severe mental and/or physical disabilities. Many individuals in Florida who are not licensed as attorneys hold themselves out as "Medicaid planners." Those who practice law without the proper training and licensure can cause great harm to elders and their families.

In Florida, practicing law without a license is a third degree felony.[2] The Florida Supreme Court has given The Florida Bar the responsibility for investigating and prosecuting unlicensed practices of law.[3] Anyone with information regarding an individual practicing law without a license may initiate a complaint alleging UPL. However, as a general rule, The Florida Bar will not take action in an alleged UPL case without a formally initiated written complaint.

Definition of UPL in Florida

A single, all-embracing definition of the unlicensed practice of law does not exist. In Florida, UPL is defined through caselaw as opposed to through some universal, unchanging definition. In other words, context matters.[4]

More specifically, the law says:

> The practice of law … includes the giving of legal advice and counsel to others as to their rights and obligations under the law and in preparation of legal instruments, including contracts, by which legal rights are either obtained, secured, or given away …[5]

The biggest concern the court has in defining, preventing and regulating legal practice is "the protection of the public from incompetent, unethical, or irresponsible representation."[6]

UPL activities regarding Florida Medicaid planning

Generally, the preparation of legal documents by a non-attorney is considered UPL. However, providing preprinted legal forms for clients to complete by themselves is not UPL.

Instances that may be deemed as UPL include the drafting of the following documents by a non-attorney: 1) qualified income trusts; 2) personal service contracts: 3) durable powers of attorney; and 4) living trusts, irrevocable trusts, wills, living wills or health care surrogates.

Possible participants in UPL activities may include any individual who:

- is not licensed as an attorney and who states he or she is an attorney;
- is not licensed as an attorney who appears to be giving legal advice to members of the public;
- provides payment of a "kick back" to a nursing home or an assisted living employee in return for a client referral; this may be a warning sign of possible UPL activity.[7]

UPL in Florida is a complaint-driven process

Before The Florida Bar will investigate or prosecute a UPL allegation, someone generally must file a written allegation of UPL with the Bar. A short form that can be completed to report alleged instances of UPL is available for the public to download at *www.floridabar.org*. The Florida Bar website's consumer information section[8] also highlights the basic UPL procedures.

Complaints are investigated by one of the 31 local circuit committees. A statewide Standing Committee on UPL, half of which members are non-lawyers, oversees the activities of the local circuit committees and sets policy. The Standing Committee on UPL also issues proposed formal advisory opinions that ultimately must be approved by the Supreme Court of Florida.[9]

Public letter from The Florida Bar Committee for UPL

On May 13, 2009, The Florida Bar Standing Committee for UPL issued a letter that established certain activities that constitute clear UPL violations and some activities that would be considered on a case-by-case basis.[10]

Activities that constitute clear UPL include: 1) establishing irrevocable trusts; 2) establishing qualified income trusts; and 3) hiring an attorney to review, prepare or modify documents for customers if payment to the attorney is through a non-attorney Medicaid planning company.

Activities determined on a case-by-case basis include: 1) restructuring assets; 2) counseling customers on the best way to get Medicaid approval; and 3) advertising as an "elder counselor."

The May 13, 2009, letter, in tandem with the Rules Regulating The Florida Bar, also indicates there is substantial risk that an attorney could violate Florida Bar rules by affiliating with non-attorney Medicaid planners in three significant ways:[11]

1) an attorney receives a payment directly from a non-attorney Medicaid planner for services provided to a client;[12]

2) an attorney assists a non-attorney Medicaid planner in the unlicensed practice of law;[13]

3) an attorney forms a partnership with a non-attorney Medicaid planner.[14]

The committee voted based on existing caselaw that the hiring of an attorney to review, prepare or modify documents for customers—if there was a direct relationship with the attorney and payment was made directly to the attorney—would *not* be UPL.

A legal reason for the complaint-driven process

The following case is a legal reason why the investigation of alleged UPL activity in Florida is complaint driven.

In *Surety Title Insurance Agency, Inc. v. Virginia State Bar*, the plaintiff filed an action against the Virginia State Bar. The plaintiff claimed that certain advisory opinions issued by the Virginia State Bar, coupled with the threat of disciplinary proceedings against those non-attorneys who disregard the advisory opinions, illegally restrain commerce in the area of title insurance and constitute an illegal group boycott, and an attempt to monopolize, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C §§ 1 and 2.

The United States District Court for the Eastern District of Virginia held that the actions by the Virginia State Bar were in violation of federal laws that prohibit the restraint of commerce. The court held that the procedures followed by the Virginia State Bar in its efforts to regulate UPL in Virginia violated federal antitrust laws.

Problems with the complaint-driven approach

For UPL to be managed, someone must report it. All complaints alleging unlicensed practice of law must be in writing and signed, under oath. In effect, the Florida UPL investigative process relies on the public to initiate the investigation of the unlicensed practice of law in Florida with a written complaint.

No one wants to be the whistleblower. Individuals who file UPL complaints may have a concern that they themselves may be sued by the person they report to The Florida Bar. Many elder law clients may also feel ashamed or embarrassed about putting their trust in the wrong hands. There may also be a fear that the filing of a UPL complaint may result in the discharge of the nursing home resident from the nursing home, if the nursing home referred the non-attorney Medicaid planner to the family.

In addition, considering the Virginia State Bar was sued on antitrust grounds, the potential for future antitrust lawsuits against state bar associations likely perpetuates the complaint-driven nature of the UPL disciplinary process.

The explosion of UPL in Medicaid planning services

Since Nov. 1, 2007, there has been a vast proliferation in the number of non-attorney Medicaid planners—financial planners, insurance agents, etc.—who are advising the public on how to obtain Medicaid benefits.

The Deficit Reduction Act of 2005 (DRA) was enacted into law in Florida on Nov. 1, 2007. The DRA made significant changes to Medicaid qualifying annuities—balloon-style Medicaid qualifying annuities could no longer be used to shelter assets for unmarried Medicaid applicants.

As a result, insurance agents who made most of their income from commissions from the sale of Medicaid qualifying annuities no longer had a source of income. Some of these insurance agents may now be providing services that are very similar to (if not the same as) the services of attorneys; i.e., they are becoming "Medicaid planners" and counseling the public on the Florida laws to obtain Medicaid benefits.

Elder Law Section establishes a UPL Committee

In 2008, the Elder Law Section created a UPL Committee with a primary goal of reducing the unlicensed practice of law in Florida by increasing awareness of UPL activities among both the public and attorneys.

John R. Frazier, current chair of the Elder Law Section UPL Committee, has submitted a request for a Florida Supreme Court advisory opinion

continued, next page

Unlicensed practice
from preceding page

defining areas of Medicaid planning services that constitute the unauthorized practice of law when rendered by non-attorneys.[15] This communication is ongoing.

Moving forward: Our duty as elder law practitioners

We must take a proactive stand to inform our clients and their families about UPL within the framework of Medicaid planning, and encourage them to report alleged instances of UPL to The Florida Bar. As elder law practitioners, increasing the awareness among the public as well as among nursing home and assisted living employees may be one of the most effective ways to combat UPL in Florida.

Obtain further information by contacting Elder Law Section UPL Committee Chair John R. Frazier J.D., LL.M., at 727/586-3306, ext. 104, or *john@attypip.com*.

***John R. Frazier** is licensed to practice law in Florida and Georgia, and he practices primarily in the fields of elder law, Medicaid planning, veterans' benefits law, estate planning, asset protection, taxation and business organizations. He is admitted to practice before the United States Court of Appeals for Veterans Claims, and he is accredited by the Veterans Administration to assist VA claimants present, prepare and prosecute claims with the VA. He can be reached through his website at www.estatelegalplanning.com. He writes this article on behalf of the Unauthorized Practice of Law Committee.*

Endnotes:

1 John R. Frazier, "The Cost of Remaining Silent about the Unlicensed Practice Of Law," http://www.estatelegalplanning.com/unlicensed-practice-of-law.html (accessed June 12, 2012)

2 Florida Statutes, Title XXXII, Ch. 454.23, http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0400-0499/0454/0454.html (accessed June 12, 2012)

3 "Rules Regulating The Florida Bar," Rule 10-1.2, http://www.floridabar.org/divexe/rrtfb.nsf/FV/3AA92E254CA01FB585256BC200450EC5 (accessed June 12, 2012)

4 John R. Frazier, *Protecting your Family's Assets: How to Legally Use Medicaid to Pay for Nursing Home and Assisted Living Care*, (*Protecting your Family's Assets*) 2nd ed. Florida, Rainbow Books Inc., 2012, 169.

5 *Florida State ex rel. The Florida Bar v. Sperry*, 140 Sd.2d 587, 591 (Fla. 1962).

6 *The Florida Bar v. Moses*, 380, 380 So.2d 412, 417 (Fla. 1980).

7 Frazier, *Protecting your Family's Assets,* 182.

8 The Florida Bar, "Filing an Unlicensed Practice of Law Complaint Pamphlet," http://www.floridabar.org/TFB/TFBConsum.nsf/48e76203493b82ad852567090070c9b9/59cac57c8be11c2085256b2f006c58a5?OpenDocument (last modified 12/11)

9 The Florida Bar, "Bar Services," http://www.floridabar.org/TFB/TFBOrgan.nsf/043adb7797c8b9928525700a006b647f/90c2ad07d0bd71fc85257677006a8401?OpenDocument (last modified 05/31/12)

10 Public letter issued by The Florida Bar Standing Committee for Unlicensed Practice of Law, dated 13 May 2009.

11 John R. Frazier, "Are You Assisting in the Unlicensed Practice of Law? What Florida Attorneys Need to Know About Working with Non-Attorney Medicaid Planners," unpublished.

12 Frazier, "Are You Assisting in the Unlicensed Practice of Law?"

13 Frazier, "Are You Assisting in the Unlicensed Practice of Law?"

14 Frazier, "Are You Assisting in the Unlicensed Practice of Law?"

15 Renee E. Thompson, "Annual Reports of Sections and Divisions of The Florida Bar," Fla. B.J. (June 2011) Vol. 85, No. 6.

MARK YOUR CALENDAR!

August 7-13, 2012
Elder Law Section Out-of-State Retreat
Glacier National Park, Montana

September 6, 2012 • 12 noon-1 p.m.
"Tricks of the Trade" Teleconference
(An email with the call-in information will be sent to all section members prior to the teleconference.)

November 1, 2012 • 12 noon-1 p.m.
"Tricks of the Trade" Teleconference
(An email with the call-in information will be sent to all section members prior to the teleconference.)

November 30-December 1, 2012
AFELA
2012 UnProgram
Embassy Suites, Orlando Airport

January 18-19, 2013
Elder Law Annual Update and Review
Reunion Resort, Orlando

'Just ask your attorney'
Financial planning for guardians

by Frank S. Leontitsis

More often than not, when a guardian of the property is appointed for a ward under Florida Statutes Chapter 744, a significant part of the ward's estate is made up of "discretionary" assets, which can include both personal and real property, and is available to the guardian to invest and manage as he or she sees fit. Depending on the ward's circumstances, these funds will be needed to pay for living expenses, in-home caregivers, rent or mortgage payments, costs of residing in an assisted living facility or a nursing home and many other costs of guardianship. It is the duty of the guardian of the property to ensure that a forward thinking plan is implemented to best preserve the ward's assets and provide for his or her care.

The standard of care for a guardian of the property is set out in Florida Statutes Section 744.361(6), which reads:

> A guardian who is given authority over any property of the ward shall: protect and preserve the property and invest it prudently as provided in chapter 518, apply it as provided in s. 744.397, and account for it faithfully.

The prudent investor rule in Chapter 518 places a significant duty on a guardian of the property, specifically requiring:

> … the exercise of reasonable care and caution … to be applied to investments not in isolation, but in the context of the investment portfolio as a whole and as a part of an overall investment strategy that should incorporate risk and return objectives reasonably suitable to the trust, guardianship, or probate estate.

This standard requires the guardian to look at many factors when managing the ward's property. These factors can include income tax consequences, the ward's overall estate plan, planning for future public benefits applications with Medicaid and the Veterans Administration if appropriate, support of the ward's dependents and the costs and liabilities associated with the upkeep of real property.

Upon a guardian's appointment by a court, and perhaps after the verified inventory of the guardian of the property is filed, the attorney and the guardian should meet to review the history of the assets and investment strategy and set out a comprehensive plan for the management of the ward's assets and care, taking into account the ward's income and expenditures and the ward's estate plan, where appropriate. This will serve to put the guardian on notice of potential issues before they arise. At that point, it is always advisable for the guardian to meet with a financial advisor. It may be appropriate for the financial advisor to submit a proposal with his or her recommendations for an investment plan to the guardian, taking the above factors into account.

There are many financial tools at a guardian's disposal. For example, if the ward has little cash but significant equity in a home, it might be advisable for the guardian to pursue a reverse mortgage. Guardians frequently find themselves having to manage multiple certificate of deposit accounts held by several institutions. These situations can be opportunities to put a ward's assets to much better use. Of course, there are risks involved with any financial product, so the guardian should discuss several options with his or her attorney to avoid any traps for the unwary.

The consequences of not reviewing previous records and coming up with a plan for the future with an attorney can be serious. A colleague representing a guardian of the property recently described a case where the ward had a will that left specific bequests of cash to three family members. Knowing this, but not understanding exactly what it meant, the guardian met with a financial advisor and bought three annuities that were equal to the specific bequests and named the specific devisees as beneficiaries of the annuities. The guardian unwittingly invited litigation upon the death of the ward because the estate was still required to make the cash bequests under the will, effectively doubling the gift to those beneficiaries and lessening the balance of the residuary estate. This is just one example, but it is likely that most attorneys that regularly represent guardians of the property can describe similar cases of such unintended consequences.

While one cannot expect an attorney to give investment advice, an elder law attorney should become familiar with the types of financial products available for the elderly and the pros and cons of the most popular. Guardians make decisions every day that are fraught with potential for liability. Developing a sound investment strategy, in concert with a financial planner, at the onset of a guardianship can benefit the ward financially and avoid harmful results down the road.

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Recent POMS changes affect special needs trusts

by Travis D. Finchum

The Social Security Administration (SSA) has been very busy over the past several months. There have been several published changes to the POMS (Program Operations Manual System) regarding special needs trusts (SNTs) as well as "unpublished" changes in policy. Most of these changes aren't applicable to third-party SNTs, just to self-settled SNTs. Keep in mind that the federal law controls Florida's interpretation of special needs trusts. See F.A.C. 65A-1.702, which states, "the department applies trust provisions set forth in 42 U.S.C. § 1396p(d)." While the Department of Children and Families may lag behind the SSA in the implementation of some policies, we need to be aware of SSA policy changes and make sure our SNTs stay in compliance.

SSA changed these POMS:

- SI 01120.199 on April 3, 2012
- SI 01120.201 on May 17, 2012
- SI 01120.225 on April 4, 2012
- SI 01120.227 on April 3, 2012

The change to Section 199 deals with early termination clauses in SNTs. This POM was originally adopted in 2010, and it makes any type of an early termination clause in a SNT defective unless it immediately requires Medicaid payback upon termination. The recent change to this POM threw out a life preserver. For trusts originally accepted by SSA that do not currently comply because of a defective early termination clause, SSA is giving a 90-day time period to reform the document to comply. Make sure your SNTs allow for reformation to continue to comply with changes in law.

The change to Section 201 was subtle but impactful. Section 201 deals with the treatment of all trusts by SSA, not just SNTs. Two examples were added under the section defining the term "sole benefit" as it applies to trusts. We know, according to the SSA, that (d)(4)A and (d)(4)C trusts must be established "for the sole benefit of the individual." This is in spite of the fact that the term "sole benefit" is not found in the (d)(4)A statute like it is in (d)(4)C.

New Example 1 under SI 01120.201 F2 comments that a SNT that has language allowing the trustee to pay for family members to come to visit the beneficiary violates the sole benefit rule. Such language would cause the trust to be invalid, even if the trustee never makes such payments. Therefore, it would follow that if a SNT does not contain such language, but the trustee nevertheless pays for family to come and visit, then such payments would violate the sole benefit rule and jeopardize SSI and Medicaid eligibility. Make sure your trusts don't have this language, and if they do, change them. There is no "life preserver" in this section, so you won't get a 90-day grace period to fix it after SSA raises the issue.

Section 225 deals with only pooled SNTs. This POM was originally implemented in 2010 and clarified the nonprofit's role in overseeing the pooled trust. This recent change threw back out the life preserver for pooled trusts that were previously excepted as a resource but because of this POM are no longer excluded. These trusts will have a one-time 90-day period to be amended to conform.

Section 227 deals with null and void clauses and was originally implemented in 2010. Before this POM, many defective SNTs, both individual and pooled, were "saved" by a savings, or null and void, clause. In essence, previously you could draft a completely defective SNT but include a phrase stating that if there is any languge in the trust instrument that causes the SNT to violate the POMS regarding SNTs, then the offensive language is void. SSA was routinely approving SNTs after citing violative languge by referring to the savings clause in the document and thus voiding the offensive language. This is no longer the case. Although this entire POM may violate some state laws allowing savings clauses, SSA said it will no longer allow such clauses to save the rest of the document. Defective trusts must be repaired throughout. The recent change here threw out the life preserver one last time to allow for amendments to fix these defective trusts if done within 90 days from notice by SSA.

Another recent development coming from SSA is not supported by any written policy change. For individuals on supplemental security income (SSI), we have always been concerned about in-kind support and maintenance (ISM). You may recall that ISM occurs when someone, or a trust, pays for food or certain shelter expenses for a beneficiary. ISM can reduce, and in some cases, eliminate SSI benefits. In addition to ISM, we now have to worry about something called "in-kind income." This occurs if someone buys items other than food or shelter for a beneficiary and then gets reimbursed by a SNT (or anyone else for that matter). SSA will count such payments to others as in-kind income to the SSI recipient and reduce monthly benefits dollar-for-dollar, with no limit. At least with ISM there is a maximum SSI reduction of $252.66 for this year.

The references to in-kind income in the POMS only deal with ISM in the form of food or shelter. This new interpretation means SNTs cannot reimburse someone who pays for non-food or non-shelter items for a

person on SSI. SNTs can only pay for those expenses directly. This is quite a challenge to overcome with today's aversion by commercial retailers to accept third party checks. The traditional approach has been to have a friend, family member or professional care manager purchase non-food items for an SSI beneficiary and then get reimbursed by the SNT. SSA has begun denying benefits for SSI and pursuing overpayments based on this in-kind income concept. This has all been done with no formal, written change in policy.

In conclusion, if you see a client with a problem SNT, see if one of the new 90-day life preservers is available to allow the trust to be modified. Check your SNTs for defective early termination clauses and also for phrases allowing for payment of travel for family members to come and visit. Modify your trusts that have these problems. Make sure you have an easy trigger in your SNTs to make modifications when needed. Finally, don't let trustees of SNTs reimburse third parties for purchases of any kind, and if you hear of any beneficiary being adversely affected by such disbursements, let me or anyone on the SNT Committee know; we may be interested in taking on an appeal.

Travis D. Finchum, Esq., *received his bachelor's and law degrees from the University of Florida. He is board certified in elder law and a past chair of the Special Needs Trust Committee of the section. He serves on the Committee on Board Certification. He practices with Special Needs Lawyers PA (www.specialneedslawyers.com) with fellow board certified elder law attorney Steve Hitchcock. They specialize in Medicaid qualification, special needs trusts, estate planning and planning for incapacity and nursing home care. They also do guardianship, guardian advocacy and advocacy for individuals with developmental disabilities. Finchum is a founder of the Guardian Trusts (www.guardiantrusts.org), which administers all forms of special needs trusts, including third party, (d)(4)A and pooled special needs trusts.*

Tax tips for elder lawyers

by Michael A. Lampert

New IRS power of attorney

It seems that each time the IRS "improves" its power of attorney form (Form 2848), the agency makes it more difficult for practitioners. The latest revision is dated March 2012. Fortunately, forms submitted prior to the new form being issued are still acceptable. Some tips when working with Form 2848:

1) You now need separate powers of attorney for husband and wife.
2) In the area on the new form where you (the representative) list your name and other information, there is now a very small box. You need to check this box if you also want to receive notices and communications from the IRS. This box is new and easy to miss.
3) Review carefully whether or not you want any of the additional items listed in paragraph 5, acts authorized. These involve the power of disclosure to third parties, the power to substitute or add representative(s) and the power to sign returns. Many times, you will want the first two powers.
4) Make sure the size of the print you use when completing the form is large enough to read when the form is faxed. The IRS will reject a POA that is legible to you if it becomes illegible when faxed. This is the case when using the *irs.gov* fill-in online Form 2848.
5) Despite the section for it on the form, you do not need to provide a telephone number for your client on the POA. Leaving the box blank might reduce the number of calls to your client by the IRS.
6) To be safe, try to keep the date of signing of the POA by the client within three days of your signing the POA as the practitioner. Otherwise, the IRS may reject the POA. (Usually anything within a month is acceptable, yet sometimes the IRS says three days—be safe!)

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

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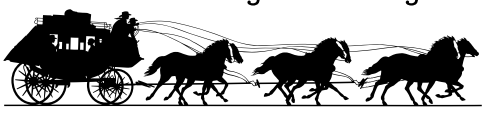

What to do when the will 'goes missing'

The tale

"But all I can find is a copy." Your client cannot find the original will of her deceased mother, and there are assets to be probated. Mom specifically disinherited that thief of a daughter, Mary, who stole her savings bonds three years ago, and if the will cannot be found, then Mary will receive a share. Certainly not what Mom intended!

The tip

Fortunately, Florida Statute 733.207 and Probate Rule 5.510 provide a procedure for the establishment and probate of a lost or destroyed will. First, you must establish the content of the will. The problems begin when the decedent was the last person to have possession of the will. In that case, a presumption arises that the testator destroyed the will with the intent to revoke the document. You may be called upon to prove otherwise.

The first part is fairly easy. If a copy is not available, the specific content of the will must be proved by the testimony of two disinterested witnesses. A disinterested witness is one who has no interest in the cause or matter in issue and who is lawfully competent to testify. A friend or a relative who is not a beneficiary or the attorney who prepared the will can be disinterested witnesses. If a copy is available, then we only need one disinterested witness. There is almost always a copy of the will available. I have successfully used an oath of witness to will (copy), FLSSI Form 3.0301, to prove the content of the will when there is a copy available.

Probate Rule 5.510(d) requires that formal notice be given to those who, but for the will, would be entitled to the property. So that bad sister, Mary, will have to be given notice. The petition should be titled "Petition for Establishment and Probate of Lost or Destroyed Will" and replaces the standard petition for administration. A sample of this petition and the order that should accompany it can be found on the Elder Law Section's website under the Probate & Estate Planning Committee's section: *www.eldersection.org/comchair.asp*.

Tips & Tales

by Kara Evans

The most difficult part of probating a lost or destroyed will is proving it was not revoked. In Florida, when a will known to have existed prior to the testator's death is lost, and its loss cannot be explained, a rebuttable presumption arises that the testator destroyed the will with the intention of revocation. *Walton v. Estate of Walton,* 601 So.2d 1266 (Fla. 3d DCA 1992), rev. denied, 617 So.2d 319 (Fla.1993). The proponent of admitting such a lost will to probate has the burden of introducing competent substantial evidence to overcome this presumption. *In re: Estate of Sangenito*, 631 So.2d 1125 (Fla. 4th DCA 1994). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence, but refers to the existence of some evidence (quantity) as to each essential element and as to the legality and admissibility of that evidence. Competency of evidence refers to its admissibility under legal rules of evidence. "Substantial" requires that there be some (more than a mere iota or scintilla) real, material, pertinent and relevant evidence (as distinguished from ethereal, metaphysical, speculative or merely theoretical evidence or hypothetical possibilities) having definite probative value (that is, "tending to prove") as to each essential element of the offense charged. *Dunn v. State*, 454 So.2d 641 (Fla. 5th DCA 1984).

If all the parties involved will sign a joinder and consent, there is no problem. But good luck getting Mary to consent to being disinherited! In several of my cases where the will was last in the possession of the decedent but could not be found, I simply modified the FLSSI Form 3.0301. I titled it "Testimony to Establish Lost Will" and included the reasons why the will was missing. For example: "decedent was moved seven times in the last year from various hospitals and nursing home facilities, and during the moves the will was lost" or "decedent had an envelope and stated to various persons such envelope contained her will. After her death, the envelope was found to contain only a copy." A simple, rational and reasonable explanation will suffice.

Remember that a proceeding to probate a lost or destroyed will is a declared adversary proceeding under Rule 5.025. However, it does not have to be an undue burden to admit a copy. Your client will certainly be happy to know that Mary will not be sharing in Mom's estate.

Summary of selected caselaw

by Diane Zuckerman

Preference in appointment of personal representative/ evidentiary hearing

George M. Bowdoin, Individually, and as natural guardian and next friend of Britney Bowdoin, Appellant, v. Mary L. Rinnier, Appellee, No. 2D10-3413 (Fla. 2nd DCA 2012)

This case involves the order of preference for personal representatives. Cynthia Bowdoin died intestate, leaving a husband and a daughter as heirs of her estate. Her mother, Mary L. Rinnier, filed a petition for administration requesting that she be appointed the personal representative of her daughter's estate. George Bowdoin, the surviving spouse, filed a counter-petition seeking appointment as personal representative. After a hearing, the court appointed the decedent's mother. The husband appealed. The trial court acknowledged that the husband had preference in appointment pursuant to F.S. 733.301, but determined it was in the best interest of all the parties to appoint Rinnier.

The Second District concluded that the trial court abused its discretion by applying the wrong standard. The district court held that if a statutorily preferred person is not appointed by the trial court, then that court must find that the preferred person is not fit to serve as personal representative. In other words, the court has discretion to deviate from the statutory preference only when the person "lacks the necessary qualities and characteristics" to act as the personal representative, relying on *Padgett v. Estate of Gilbert*, 676 So. 2d. 440 (Fla. 1st DCA 1996).

At the hearing, there was no evidence to show that Bowdoin lacked the qualifications to serve. Apparently the petition filed by Rinnier alleged facts of misdeeds, but there was no evidence presented to support the allegations and therefore no evidentiary basis to support the trial court's ruling.

The district court remanded for an evidentiary hearing to determine whether Bowdoin lacked the necessary qualities to serve.

The take-home message for this case is that when seeking to have someone other than the statutorily preferred person, or defending, the parties must request an evidentiary hearing and be prepared to call witnesses or to submit documentary evidence in support of their respective positions.

Homestead property not restricted to fee simple ownership

Lawrence Geraci, Jr., as Personal Representative of the Estate of Mary J. Geraci, Deceased, Appellant, v. Sunstar EMS, an unregistered fictitious name of Pinellas County Emergency Medical Services Authority, and Agency for Health Care Administration, Appellees, Case No. 2D11-1234 (2nd DCA, 2012)

In this case, the appellant sought review of the trial court's order determining that the decedent's condominium was not protected homestead and therefore not exempt from forced sale. The Second District considered the question of whether a condominium that is subject to a long-term lease qualifies as a homestead.

Upon receiving notice of death, the appellees filed a statement of claims against the estate. The appellant filed a petition to determine homestead. The trial court determined that the condominium did not qualify as a homestead on the grounds that the property was a leasehold and not an interest in fee simple.

In overturning the trial court, the Second District noted that Article X, Section 4(a) does not distinguish between different kinds of ownership interests that are entitled to the homestead exemption protection against forced sale by creditors. In making such a determination, the court reasoned that the focus should be on the debtor's intent to make the property her home and the debtor's actual use of the property as her principal and primary residence.

The trial court apparently had determined that the homestead exemption was restricted to fee simple ownership, to the exclusion of other types of ownership. The Second District, however, stated that the exemption from forced sale was applicable to other beneficial interests in land and was not limited to a fee simple interest.

Accordingly, the district court found that the trial court had erred in finding that the condominium was not protected homestead and remanded the case with directions for the court to declare that the condominium had homestead status under Article X, Section 4 of the Florida Constitution and was therefore exempt from creditors' claims.

This case stands for the proposition that the type of property interest the decedent held is not determinative of homestead status. Instead, determination rests on whether the decedent used the property as his or her primary residence at the time of death.

Construction of a will

Terry Glenn, Appellant, v. Dawn Roberts, Appellee, Case No. 3D11-1093 (3rd DCA, 2012)

In this case, the Third District interpreted two provisions in the decedent's will as follows:

> Article III. I hereby give, devise and bequeath all of the rest, residue and remainder of my estate, both real and personal, of whatsoever kind and nature, and wheresoever the same may be situate unto my friend, TERRY GLENN, having

full confidence he will honor all requests made to him by me prior to my death as to friends whom I desire he benefit.

Article V. In the preparation of this, my Last Will and Testament, I have carefully and thoughtfully considered each member of my family and all of my friends, and have not unintentionally omitted any of them, as it is my desire, and I so direct, that only those beneficiaries named herein, share as beneficiary of my probate estate.

Terry Glenn, who was named as the personal representative in the will, filed for probate administration. In response, Dawn Roberts, the decedent's only grandchild, filed a petition to set aside the will. Roberts argued that the first sentence of Article III, devising the residuary estate to Glenn, was ineffective as a testamentary disposition because it was an oral instruction requesting that he follow the decedent's instructions. She argued that such instructions were not set forth in writing as required by F.S. 731.201(36) and 732.502. As such, Roberts asserted that the will was not valid and argued the decedent's estate assets should be disposed of in accordance with the intestate statutes.

Roberts filed a motion for judgment on the pleadings. The trial court granted Roberts' motion and ordered that the residuary property be distributed pursuant to Florida's intestacy statutes. The personal representative appealed.

In reversing the trial court's order, the Third District noted that a motion for judgment on the pleadings may only be granted if the moving party is clearly entitled to a judgment as a matter of law. The court reasoned that the polestar of will interpretation is the testator's intent, which is ascertained from the four corners of the document through consideration of all of the provisions of the will, taken together, rather than from detached portions or any particular form of words.

In reliance, the court cited *In re Gregory's Estate*, 70 So. 2nd 903 (Fla. 1954), *In re Smith*, 49 So. 2d. 337(Fla. 1950), and *Wehrheim v. Golden Pond Assisted Living Facility*, 905 So. 2d. 1002 (Fla. 5th DCA 2005), for the proposition that in construing a will, the whole instrument and testamentary scheme must be considered by the court.

The district court rejected the trial court's assertion that this was an unauthorized oral will. The district court found that the language in Article III was merely precatory and not mandatory. The court noted that the language did not mandate Glenn to distribute the residuary estate but rather expressed hope that Glenn would honor the decedent's request. The court determined that the language in the third article was unambiguous and devised the entire residuary estate to Glenn.

The district court interpreted Article V as establishing that the decedent intended to disinherit her

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family and that the omission was intentional.

Finding that the trial court erred in striking the will, the district court remanded the case with directions to enter judgment in favor of the appellant.

The take-home message for this case is to reinforce the importance of using clear language in a will as well as making a distinction between precatory and mandatory language. Double negatives should be avoided. Perhaps the will's contest could have been prevented if the will had stated the testator was intentionally disinheriting her family and giving the residuary estate to Glenn. The precatory language arguably caused confusion, as evidenced by the differing interpretation between the trial and district courts.

Guardianship/majority of examining committee members finding of capacity requires dismissal of petition

Joseph Rothman, Petitioner, v. Daniel Rothman, Jonathan Rothman, Thomas Panza, Esq. (Conservator), Respondents, No. 4D11-4197 (Fla. 4th DCA 2012)

Joseph Rothman, the alleged incapacitated person (AIP), petitioned the Fourth District for a writ of mandamus requiring the trial court to dismiss a petition to determine incapacity on the grounds that two of the three examining committee members had twice determined the petitioner was capacitated.

The AIP relied on F.S. 744.331(4), which states "If a majority of the examining committee members conclude that the alleged incapacitated person is not incapacitated in any respect, the court shall dismiss the petition."

The respondents argued that if this statute was interpreted too literally, that is, to require dismissal automatically without judicial review, it would violate basic tenets of judicial power, procedural due process, substantive due process and access to the courts. The trial court agreed with the respondents and denied the motion for dismissal, holding that F.S. 744.331(4) was unconstitutional.

The Fourth District sided with the AIP, stating that F.S. 744.331(4) should be strictly construed, noting that the statute is clear on its face, and holding that if the examining committee reports find that the AIP is capacitated, the court "shall" dismiss the petition. The Fourth District granted the petition for writ of mandamus and directed the trial court to dismiss the petition.

This case stands for the proposition that if at least two of the three examining committee members find that the AIP is capacitated, then dismissal is automatic and the court may not hear other evidence of incapacity. Therefore, clients should be informed that the examining committee reports may well be determinative of the outcome.

Guardianship/standard for determining legal incapacity

Frances L. Losh, Appellant, v. Carlin McKinley, Appellee, No. 3D11-1575 (3d DCA, 2012)

This case reaffirms the public policy behind guardianship law requiring sufficient due process before an individual's rights are removed. Here, 93-year-old Francis L. Losh appealed a trial court's order that determined she had limited incapacity.

The petition for incapacity was filed by Losh's daughter. The court appointed the three-member examining committee consisting of David Echavarria, Ph.D., Addys Prieto, Psy.D., and Lloyd Miller, M.D. Both Miller and Prieto found no incapacity; however, Echavarria believed that Losh, the alleged incapacitated person, was "partially oriented." In response, Losh filed a petition to strike the examining committee's report. The facts reflect that Losh disputed she had any incapacity and was distrustful of her daughter's motives in filing the petition.

For reasons not specified in the opinion, a conflict arose regarding Miller, so the court discharged him and appointed Alfred Jonas, M.D., the third examining committee member and ordered a second evaluation by the other committee members.

On re-exam, Prieto again recommended no guardianship. In his report, he noted that Losh was oriented to person, place and time; could name three current event issues; and

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handled her own financial affairs.

On re-exam, Echavarria again recommended a limited guardianship, based on his findings of mild deficits, and opined that Losh was incapable of handling her financial affairs independently.

Jonas recommended a limited guardianship was needed only "to manage property and make gifts."

A hearing was held in which Losh testified on her own behalf. The opinion reflects she testified in detail regarding aspects of her finances and real property. She was aware of her monthly expenses, medications and medical conditions.

At the conclusion of the hearing, the judge found that Losh had diminished capacity in several areas and removed all her rights with the exceptions of her right to vote and her right to determine her residence.

Losh appealed, and the Third District reversed. In its analysis, the Third District noted that under the Florida guardianship statutes, an individual must be incapable of exercising his or rights, whether wisely or otherwise. The standard is clear and convincing evidence. The court held that the evidence presented at trial fell way short of showing incapacity. The court overturned the trial court and remanded with orders to restore Losh to her full capacity and to dismiss the guardianship proceeding.

Interestingly, the court noted that the trial court judge most likely had good intentions for his ruling, but cited *In re Maynes v. Turner*, 746 So. 2d. 564 (Fla. 3d. DCA 1999), saying, "in our present day paternalistic society, we must take care that in our zeal for protecting those who cannot protect themselves, we do not unnecessarily deprive them of some rather precious individual rights."

This case is helpful to those representing an alleged incapacitated person, when that individual opposes the guardianship. It also reiterates the high legal standard required to find incapacity, whether plenary or limited.

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