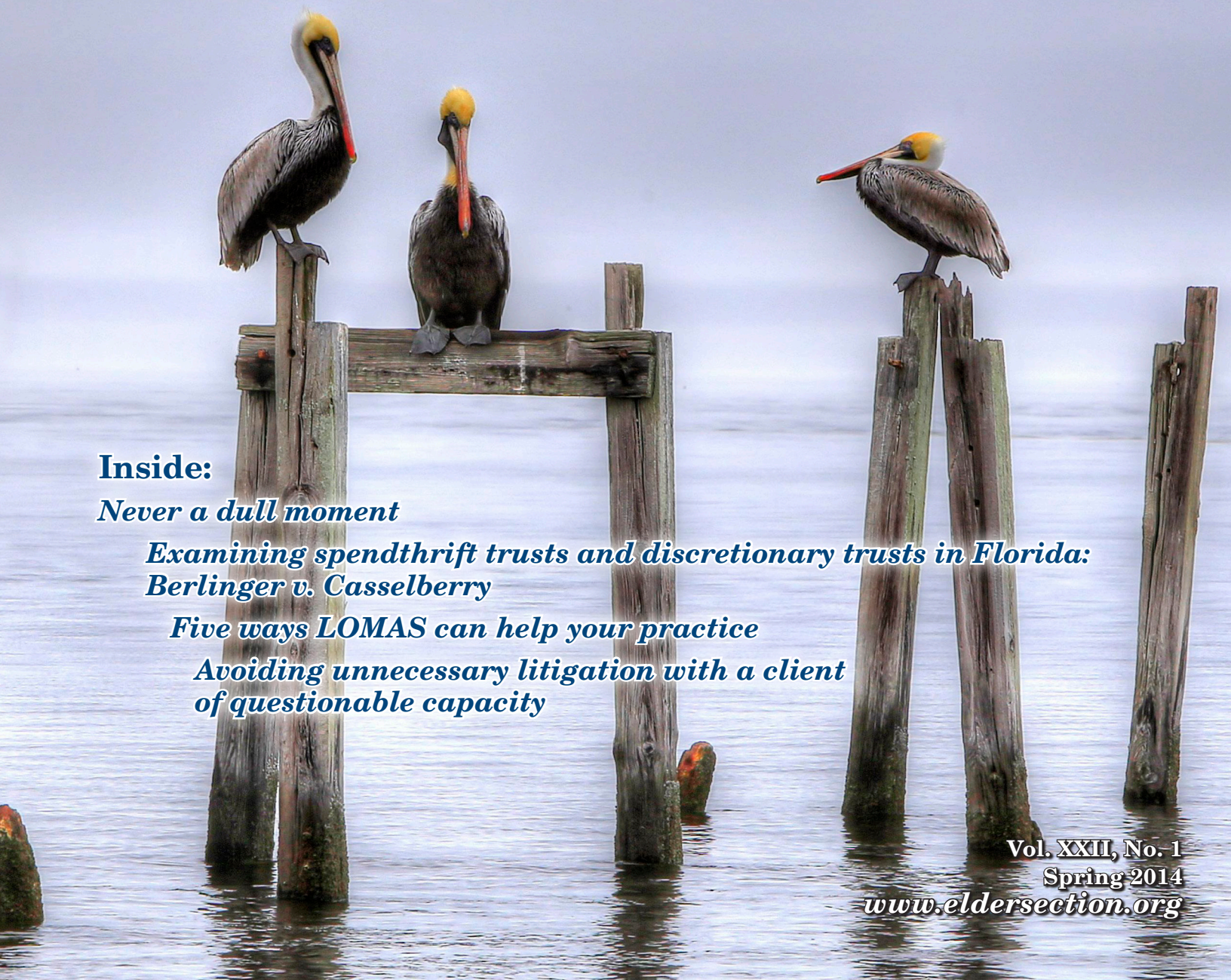
The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"



Inside:

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The Elder Law Advocate

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A publication of the Elder Law Section of The Florida Bar

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Statements or expressions of opinion or comments appearing herein are those of the contributors and not of The Florida Bar or the section.

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

COVER ART

"Waiting for Lunch"

by Randy Traynor, Florida Bar Staff
(www.randytraynorphotography.com)

4/2014

Contents:

The deadline for the SUMMER ISSUE is July 1, 2014. 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.

Advertise in *The Advocate*

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

Advertising rates per issue are:

Full Page	$750
Half Page	$500
Quarter Page	$250

The newsletter is mailed to section members, Florida law libraries and various state agencies. Circulation is approximately 1,900 in the state of Florida.

Interested parties, please contact Arlee Colman at *acolman@flabar.org* or 850/561-5625.

Never a dull moment

John S. Clardy III

Message from the chair

The practice of elder law in Florida is never boring. The number and complexity of issues our clients face can be daunting. As capacity and care needs change due to age and illness, seniors and their families face a patchwork of programs and services that do not always logically flow together. By explaining to our clients and their decision makers how the myriad regulations and programs affect their situation, elder law attorneys can provide some order and needed guidance at a very stressful and chaotic time.

The Elder Law Section continues to be a voice for our clients and a resource for our members. Here is what has been going on recently.

In January, the CLE Committee and our chair-elect, Jana McConnaughhay, presented another successful Elder Law Annual Update seminar in Orlando. Listening to the range of topics discussed over the three days, one can appreciate the depth and breadth of elder law's subject matter. Once the Annual Update was completed, our focus quickly turned to the Legislative Session in Tallahassee.

The Legislative Committee has been following and advocating for several bills introduced this year.

House Bill 409 by Rep. Kathleen Passidomo (R-Naples) gives tools to law enforcement and state attorneys to better fight financial crimes against vulnerable adults. The section's Exploitation & Abuse Committee has been instrumental in working with state attorneys, law enforcement and others in identifying barriers to successful prosecutions of exploiters of elderly persons and disabled adults. This proposal amends both the criminal exploitation statute and the evidence code to address the unique challenges faced when investigating and prosecuting exploitation cases.

Another area of the law seeing legislative interest this year has been in guardianship. Several bills have been filed that attempt to change certain portions of Chapter 744. While it is unknown whether these bills will pass, legislative leaders have indicated the issues raised by the proposals should be studied this summer. There will be opportunities this summer for our section to help influence the shape of Florida's guardianship statutes and rules. The Guardianship Committee will be engaged in this process as things move forward.

In addition to new legislation, elder law attorneys are assisting clients with the implementation of Medicaid managed care, based on legislative action in 2011. Over the coming year, our elderly clients and their families will be facing new choices for services offered by competing for-profit managed care organizations.

Most long-term care Medicaid beneficiaries are among the most vulnerable and high-cost enrollees and have complicated coverage decisions to make due to their dual eligibility status with Medicare and Medicaid. Nursing homes, assisted living facilities and enrollment brokers are unable to provide recommendations, only information. Elder law attorneys can be at the forefront of advocacy for our clients by providing oversight and feedback from the consumer's perspective. The Medicaid Committee will continue to monitor what is working and what is not, and through its contacts with state agencies, the committee will be able to bring those issues to light and ensure program savings are not coming at the cost of care to our clients.

Lastly, the section's Unauthorized Practice of Law Committee requested The Florida Bar's Standing Committee on UPL to petition the Supreme Court for an advisory opinion on what constitutes the unauthorized practice of law in the field of Medicaid planning. A proposed advisory opinion has been submitted to the Florida Supreme Court and is under review as of this writing.

This advisory opinion is important because it will clearly identify those activities that are the practice of law, and therefore require an attorney's skill and knowledge, and those activities that may be undertaken by non-lawyers. The proposed opinion would find that the rendering of legal advice regarding the implementation of Florida and federal law to obtain Medicaid benefits constitutes the unauthorized practice of law.

The Elder Law Section believes this opinion will curtail non-attorney planners who hold themselves out as experts in Medicaid planning, but use the guise of planning to sell unsuitable annuities and other insurance products. This opinion will also protect legitimate non-attorney planners by giving them clear guidance on what activities can be undertaken by them without engaging in the unauthorized practice of law. A third benefit will be to give guidance to attorneys who work with clients of non-attorney planners and will help them avoid assisting in the unauthorized practice of law.

In addition to the committees mentioned above, the section has committees for those interested in estate planning and probate, special needs trusts, veterans' issues and financial products. There are also opportunities to get involved with planning our educational programs, volunteering with our mentoring program or evaluating professionalism issues through our Ethics Committee.

Your involvement in the Elder Law Section not only helps the section be an asset to our members, but it can also provide cutting-edge, substantive information for your practice and help you develop contacts with other elder law attorneys around the state. Get involved!

Mark your calendar!

Joint Workshop on Elder Exploitation
ELS Exploitation and Abuse Committee
Florida Office of the Attorney General
May 12-14, 2014

Embassy Suites, Altamonte Springs

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The Florida Bar Annual Meeting
June 25-28, 2014

Gaylord Palms, Orlando

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ELS activities at TFB annual meeting
June 26 - Committee Training • 2-5 p.m.
(chairs to request time for committee meetings)
June 27 - Committee Training • 9-11 a.m.
(chairs to request time for committee meetings)
June 27 - Executive Council Award Luncheon • 12 noon-2 p.m.
June 27 - Executive Council Meeting • 2-4 p.m.

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Florida State Guardianship Association
27th Annual Conference
July 10-12, 2014

Vinoy Renaissance St. Petersburg Resort & Golf Club

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The Florida Bar Leadership Conference
July 17-18, 2014

The Florida Bar Headquarters, Tallahassee

Executive Council Meeting
September 11, 2014

Boca Raton Resort

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Elder Law Section Retreat
CLE: A Guide to Litigation for Elder Law Attorneys
September 11-13, 2014

Boca Raton Resort

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Elder Concert
September 13, 2014

Florida Atlantic University, Boca Raton

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Elder Concert
October 9, 2014

University of South Florida, Tampa

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Fundamentals of Elder Law
January 15, 2015

Orlando

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Executive Council Meeting
January 15, 2015

Orlando

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Elder Law Section Annual Update
January 16-17, 2015

Orlando

URGENT ALERT!

Bogus hotel & exhibit services offers

It has come to our attention that housing companies named "National Travel Associates" (877/595-7666) and "Exhibition Housing Management" aka "Exhibition Housing Services" (866/367-4414) are claiming to have a relationship with Gaylord Palms Resort and are offering hotel reservation services for The Florida Bar Annual Convention. These companies and others like it are NOT in any way affiliated with The Florida Bar or the Gaylord Palms and should NOT be used to make hotel reservations.

There is only one, official, exclusive housing block for the 2014 Florida Bar Annual Convention — Gaylord Palms Resort & Convention Center. Note: The Gaylord Palms Resort & Convention Center does not make phone calls to exhibitors or attendees to encourage you to book with them. Our group room rate at the Gaylord Palms is $193. If you have received any communication either via email or telephone, please delete it immediately and ignore any further requests. Please let The Florida Bar Headquarters know if you have any other questions or concerns. Thank you, and we look forward to seeing you at the Gaylord Palms Resort & Convention Center for the 2014 Florida Bar Annual Convention.

Cremation or burial? Making sure your clients' wishes are fulfilled

by Ellen S. Morris

ELLEN MORRIS

Many attorneys aren't aware that in order to effectuate cremation of a body after death, there are specific rules to follow. The decedent's instruction for cremation must be contained in a signed written direction document, e.g., a pre-need cremation contract, or contained in the decedent's will. The written direction must be signed personally by the decedent or by the decedent's lawful spouse. If the pre-need contract was signed by an attorney-in-fact who is not the spouse, it will be insufficient to effectuate cremation. In the absence of valid written instructions, the funeral home or crematory will require individuals, in the order of priority as outlined by statute, to all agree to the cremation in writing (via email or otherwise). If there is no surviving spouse, then the order of priority passes to the decedent's children. What happens when one or more of the children want cremation and the others refuse to consent? That was the fact pattern of my recent case.

F.S. 732.804 allows any person to carry out signed written instructions of the decedent relating to the decedent's body before issuance of letters of administration. If cremation occurs pursuant to that signed written direction and an action is commenced against whoever acted upon or relied upon that direction, the written direction provides a complete defense to the action.

In the absence of a signed written direction, the Supreme Court case of *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. 1950) is widely cited for the common law rule that, in the absence of testamentary disposition to the contrary, a surviving spouse or next of kin are legally authorized persons who have the right to the possession of the body of the decedent for purposes of burial or cremation.

Who is a legally authorized person? F.S. 497.005(39) defines a legally authorized person and the order of priority. The order of priority is closely aligned with the order of intestacy contained in F.S. 732.103.

If a decedent dies without leaving a surviving spouse and leaves two or more children, both children have equal priority and are legally authorized persons. When the children do not all agree, the attorney must ask the probate court to determine the decedent's intent for the disposition of his or her remains. The decedent's intent may be shown by presenting credible evidence of oral or informal wishes expressed by the decedent regarding disposition of his or her remains. Even if the decedent did include unambiguous language in a signed writing or will, the challenging party may present oral or informal written credible evidence that the decedent changed his or her mind and intended an alternate disposition of his or her body in order to effectuate an alternate disposition of remains. The standard of proof for overturning or contradicting a prior signed direction of the decedent is clear and convincing and not merely credible. *See Arthur v. Millstein, 949 So. 2d 1163 (Fla.4th DCA 2007), Cohen v. Cohen, 896 So. 2d 950 (Fla. 4th DCA 2005), and Andrews v. McGowan, 739 So. 2d 132 (Fla. 5th DCA 1999).*

A motion for an order determining the proper disposition of remains should be brought as soon as possible in the probate court in the event there is a dispute. As a practice tip, the attorney drafting estate planning or advance directive documents should discuss specific wishes regarding disposition of remains and include them in the documents.

Ellen S. Morris *is a partner in the law firm of Elder Law Associates PA. She was admitted to practice law in Florida in 1990. She devotes all of her professional time to elder law; wills, trusts and advance directives; Medicaid and disability planning including preparation of applicable trusts; guardianship; asset preservation planning; estate and trust administration; and elder law litigation including guardianship litigation, fiduciary litigation, will contests and nursing home residents' rights litigation.*

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Examining spendthrift trusts and discretionary trusts in Florida: *Berlinger v. Casselberry*

by Jeffrey A. Baskies, Justin M. Savioli and A. Stephen Kotler

For the first time since the adoption of the Florida Trust Code (effective July 1, 2007), one of Florida's courts of appeal has looked at the crossroad of creditors' claims and third party trusts. In *Berlinger v. Casselberry,* Case No. 2D12-6470, 6 (Fla. 2d DCA Nov. 27, 2013), the Florida Second District Court of Appeal upheld a writ of garnishment against the trustee of a third party discretionary trust. The writ of garnishment allows the creditor control over and access to any present and future distributions made to or for the benefit of the trust's beneficiary.

The *Berlinger* holding is unique because it is the first case to interpret the Florida Trust Code provisions regarding spendthrift and discretionary trusts since the Florida Trust Code became effective on July 1, 2007. Also, it is the first case to examine whether the ruling in *Bacardi v. White*, 463 So. 2d 218 (Fla. 1985), is still applicable to Florida trusts after the adoption of the Florida Trust Code.

***Berlinger V. Casselberry*: The background**

Divorce proceeding and third party irrevocable trusts. Bruce Berlinger (Berlinger) and Roberta Casselberry (Casselberry) were divorced in 2007. Under the terms of a marital settlement agreement that was incorporated into a final judgment of dissolution of marriage, Berlinger agreed to pay to Casselberry $16,000 per month in alimony.

After the divorce, Berlinger stopped working and lived off distributions made from several trusts created for his benefit by others (third party trusts, the trusts). The trusts permitted distributions to or for the benefit of Berlinger in the discretion of the trustees of the various trusts (trustees).

In May 2011, Berlinger stopped paying alimony to Casselberry. In response, Casselberry filed a motion to enforce the alimony. Subsequently, Berlinger and Casselberry entered into a settlement agreement requiring Berlinger to pay certain amounts to Casselberry. Berlinger satisfied most of his payment obligations under the settlement agreement, but a small balance remained owing. Casselberry went to court to enforce the terms of the settlement, and the judge issued the writs of garnishment.

The writs of garnishment acted like a charging lien in an LLC context. The trustees were not obligated to dig into the trusts to satisfy the debt, but they were directed that if they exercised discretion to make distributions to or for Berlinger, then those distributions must instead be made to Casselberry until her past due alimony was paid in full.

Berlinger appealed the trial court's order issuing the continuing writs of garnishment against the trustees; however, the Florida Second District Court of Appeal affirmed the trial court's ruling.

Self-settled irrevocable trusts. In addition to the third party trusts, there is brief discussion in the holding about self-settled trusts under Florida law. The court notes that in 2011, Berlinger conveyed certain real property to an irrevocable life insurance trust (the ILIT) that was not previously disclosed to Casselberry. To the extent the ILIT was funded by Berlinger, it would be deemed self-settled under Florida law. Under the Florida Trust Code, access by creditors to self-settled trusts is governed by Florida Statutes § 736.0505(1)(b), which provides that a creditor of a settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. However, after the initial reference to the ILIT, the court does not provide any further discussion of the self-settled trust issue. Therefore, the balance of this article will focus only on the third party trusts.

Understanding the creditors' rights provisions of the Florida Trust Code as applied to third party created spendthrift trusts and discretionary trusts

In Part V of the Florida Trust Code (F.S. §§ 736.0501-736.0507), Florida law addresses whether a judgment creditor can enforce its rights to attach and/or garnish (see chapters 76 and 77, F.S.) against the interests of beneficiaries of trusts. These provisions of Part V were addressed as part of the *Berlinger* holding and should be reviewed.

The Trust Code creates four types of irrevocable trusts that must be analyzed separately as to availability to creditors.

1) The first type are self-settled trusts and as noted above, access by creditors to self-settled trusts is governed by F.S. § 736.0505(1)(b). Essentially, creditors can reach the maximum amount that can be distributed to the settlor.

2) The second type of irrevocable trusts to consider are those with mandatory payments (e.g., pay all the income to my son) that are not protected by spendthrift clauses. Creditor access to those trusts is governed by F.S. § 736.0501, which provides that:

> Except as provided in [F.S. §] 736.0504, to the extent a beneficiary's interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or by other means. The court may limit the award to such relief as is appropriate under the circumstances.

Spendthrift trusts
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The statute's exclusion of F.S. § 736.0504 means that it only applies to trusts that are not discretionary, and by its own terms, the statute only applies to trusts that are "not subject to a spendthrift provision." Thus, F.S. § 736.0501 only applies to mandatory distributions from irrevocable trusts that are not subject to a spendthrift clause. For any such trusts (and hopefully there are not too many of them), the court may permit a creditor to reach the beneficiary's interests and attach the present or future required distributions.

3) The third type of trusts to consider are those with mandatory distributions that do have spendthrift clauses (spendthrift trusts). As to spendthrift trusts protected "only" by a spendthrift clause (e.g., a trust that provides that the trustee shall pay all of the income of the trust at least annually to the beneficiary but also contains a spendthrift provision), the Florida Trust Code (F.S. §§ 736.0501-736.0503) adopted a different set of rules.

As to spendthrift trusts, F.S. § 736.0502 provides in relevant part that in a trust containing both mandatory distributions to a beneficiary (thus not a discretionary trust as described in more detail below) and a spendthrift provision, "except as otherwise provided in this part ... a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before receipt of the interest or distribution by the beneficiary." A spendthrift provision prohibits a beneficiary from transferring his or her right to distributions and prevents a creditor of a beneficiary from attaching the beneficiary's interest prior to actual receipt of a distribution from the trust. In jurisdictions that recognize a spendthrift provision, including Florida, such a provision will prevent creditors from reaching a beneficiary's interest in a trust with mandatory payments prior to the beneficiary's actual receipt.

Thus, as to most creditors, spendthrift clauses are to be respected, and *most* creditors cannot get at the trust's assets or attach the distributions. However, spendthrift protection will not prevail as to all creditors. Pursuant to F.S. § 736.0503, there are certain exception creditors (e.g., minor children and present or former spouses for support, the state of Florida and the federal government) who are permitted to reach a beneficiary's mandatory distributions from a third party irrevocable spendthrift trust. In summary, when drafting the Florida Trust Code, the Legislature essentially adopted the public policy as expressed in the *Bacardi* case (validating spendthrift trusts versus most creditors but not against certain limited judgments for support).

Florida Statutes §§ 736.0503(2) and (3) allow exception creditors to obtain a court order attaching present or future distributions to or for the benefit of the beneficiary. However, the Legislature determined that avoiding spendthrift clauses should be the exception, not the norm, and F.S. § 736.0503(3) provides that the ability of exception creditors to pierce spendthrift trusts should apply "only as a last resort upon an initial showing that traditional methods of enforcing the claim are insufficient."

4) The fourth and final type of trusts to consider are those that contain no mandatory distribution provisions and instead only permit distributions to be made (or not made) in the trustee's sole discretion (discretionary trusts). The treatment of creditors' claims against discretionary trusts is also treated separately and differently under the Florida Trust Code. For discretionary trusts (those where distributions are in the discretion of the trustee, regardless of whether such trusts include spendthrift clauses or not), creditors' claims as to beneficiaries should be treated differently. These provisions are in a separate statute, F.S. § 736.0504. That statute does not allow for exception creditors and specifically says the provisions relating to exception creditors under F.S. § 736.0503 do not apply.

Notwithstanding the rights granted to exception creditors under F.S. § 736.0503(3), F.S. § 736.0504 provides that a creditor of a beneficiary of a discretionary trust, *regardless* of whether it includes a spendthrift provision, may not compel a distribution or "[a]ttach or otherwise reach the interest, if any, which the beneficiary might have as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary."

Conclusion: The *Berlinger* court opinion in your practice

In allowing Casselberry to garnish Berlinger's potential interests as a discretionary beneficiary, the court appears to extend F.S. §736.0504(2) beyond its intended scope. The court did so in reliance on the public policies and the holding in *Bacardi v White*, 463 So. 2d 218 (1985).

While noting that the creditor remedies provided in F.S. § 736.0503(3) are subject to the exception found in F.S. § 736.0504(2), the court nevertheless concludes that F.S. § 736.0504(2) "does not expressly prohibit a former spouse [a creditor] from obtaining a writ of garnishment against discretionary disbursements made by a trustee exercising its discretion." In its analysis the court determines that while F.S. § 736.0504(2) prohibits a court order against a discretionary trustee either compelling a distribution or attaching the beneficiary's interest, it would *not* prohibit a court order granting a writ of garnishment against discretionary distributions made by the trustee. Thus, the court's holding provides that a writ of garnishment may attach to the beneficiary's interests in a trust, like a charging order applies in the context of a debtor's interest in a limited partnership or a limited liability company.

While the *Berlinger* holding may overstep the express terms of the Florida Trust Code, until it is overturned on rehearing or appeal, or another district court of appeal issues a contrary opinion, the *Berlinger* holding appears to be the law in Florida.

Some advisors are suggesting most (if not all) irrevocable trusts should be moved from Florida to other more protective jurisdictions. As the *Berlinger* case

Spendthrift trusts
from preceding page

may be reheard and overturned, it seems a bit premature to move all third party discretionary trusts from Florida. However, those clients specifically expressing the desire to protect the beneficiaries of a trust from exception creditors, such as ex-spouses, or those beneficiaries who are "already in the soup" will want due consideration given now to moving the trust, because the luxury of wait and see may not be an option.

Jeffrey A. Baskies *is a native of Peabody, Mass., and a graduate of Trinity College (with highest honors) and Harvard Law School (with honors). A member of the Florida and Massachusetts bars, he is a co-founding partner of Katz Baskies LLC, located in Boca Raton, Fla., concentrating on trusts and estates, tax and business law. He is board certified by The Florida Bar as an expert / specialist in wills, trusts and estates law and is AV preeminent© rated by Martindale-Hubbell.*

Justin M. Savioli *is a graduate of the University of Miami (B.A.) and University of Miami School of Law (J.D., cum laude). He served as an articles and comments editor on the University of Miami Inter-American Law Review and was a member of Phi Alpha Delta, a professional law fraternity. He received his Master's of Laws in taxation (LL.M.) from the University of Florida. Mr. Savioli is a member of The Florida Bar, the South Palm Beach County Bar Association and the Greater Boca Raton Estate Planning Council.*

A. Stephen Kotler*, a Florida Bar board certified wills, trusts and estates lawyer, is a solo practitioner in Naples, Fla., whose practice emphasizes estate planning, asset protection, probate administration, federal transfer tax and elder law. He is AV rated by Martindale Hubbell, a Florida Super Lawyer and selected as a Best Lawyer and to Florida Trend's Legal Elite. He is a member of the executive councils of the Elder Law and the Real Property, Probate and Trust Law sections. He holds an LL.M. in estate planning from the University of Miami School of Law, a J.D. from Emory University School of Law and a B.S. from Cornell University.*

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Here's why you should plan to attend:

Attendees' comments about the 2014 Elder Law Annual Update and Hot Topics

About the speakers:
"great; excellent speakers; quality and appreciate variety; each speaker was unique but excellent—good choices; excellent, knowledgeable speakers; great choices for speakers—the humor is appreciated; valuable, educational, appreciated repetition of info from speaker to speaker"

About the seminar:
"great; fantastic; appreciate bonus sessions; the extras like the state agency MCO presentation were great; liked the new locale, appreciated natural daylight, lunch was good—healthy; valuable topics; the seminar is very informative; appreciate level of detail in presentation topics and materials; great seminar with very helpful content, hotel and lunches, breakfast and refreshments very good; well organized, ran on time, one of the best run programs I have ever attended"

About the course materials:
"great; good; was unable to download material before leaving office and had to purchase books; excellent; materials were very good, the use of acronyms in materials—should have a good definition index, especially in the Medicaid planning area; I liked having the materials emailed out in advance to review in advance and download/use on iPad"

Attendees' comments about the 2014 Elder Law Annual Update and Hot Topics

About the speakers:
"excellent set of speakers; great round-up; engaging and credible; prefer power point presentations, do not want speaker to read the materials, examples are helpful; the speakers were obviously (even to a novice) knowledgeable and able to maintain audience attention for a long day; very thorough overview"

About the seminar:
"a must for elder law attorneys new to the field; well organized; very informative; this was my first elder law seminar and I am impressed, I will be back"

About the course materials:
"very good; comprehensive resources; some very good, some too general; can't download yet, but hopefully will work; very good; I would have liked a longer session on ethics"

Scenes from 2014...

Chair-Elect Jana McConnaughhay and Program Co-Chairs Collet P. Small, Jason A. Waddell and Stephanie Villavicencio enjoy a reception during the Elder Law Annual Update and Hot Topics held Jan. 17-18, 2014, in Orlando. The reception was sponsored by Guardian Trust, Elder Counsel and the Elder Law Section of The Florida Bar.

Co-Chairs Jason A. Waddell and Collet P. Small make their closing remarks to end the very productive 2014 Annual Update and Certification Review.

Speaker David J. Lillesand, our resident Social Security guru, addresses the audience.

Speaker David R. Carlisle presents on the topic "Trust Drafting and Administration."

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Five ways LOMAS can help your practice

by Twyla Sketchley


TWYLA SKETCHLEY

As a member of The Florida Bar, you probably have heard of the Law Office Management Assistance Service (LOMAS), but you may not know all that it can do for you in your practice. LOMAS was created "to assist members dealing with all aspects of setting up, managing, merging, or closing" a law practice. LOMAS is one of the most valuable, underutilized Florida Bar member benefits. Florida Bar members pay for these services as a part of the annual dues. In 2013, its cost was only about $1.15 per member. So, for $1.15 a year, what services can a Florida Bar member expect from LOMAS?

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- Maintaining a TRUSTworthy Trust Account
- Managing Business Risk in the Law Firm
- New Rule 2.526: Digital Accessibility of Documents Electronically Transmitted to Florida Courts
- Professional Liability Insurance: Everything You Need to Ask
- Technology Planning for the New Law Practice
- Working in the Cloud: It's the Latest; It's the Greatest; or Is It?

2. **Forms & Checklists.** The LOMAS website includes a library of free practice management forms and checklists. This library includes the LOMAS Administrative Forms Handbook that contains hundreds of forms, including forms to facilitate better client communication, fee agreements, employee evaluations and workflow assignment. The online Administrative Forms Handbook is free, and the book can be purchased on DVD for $50. Other LOMAS forms and checklists include a checklist for opening a new practice, closing a practice and performing an annual review of a practice.

3. **Firm Management Resources & Help Line.** The LOMAS website also contains information on every aspect of law firm management. LOMAS staff members review practice management materials and blogs and posts links to quality, useful, economical resources. They also create high-quality content to answer common questions LOMAS is asked through its help line. The 10 most common questions are:

1. Can you help with my trust account?

2. I need help setting up my new law practice; can you help me?

3. How long do I have to keep closed files?

4. What kind of work that my paralegal handles can be billed to clients?

5. If my legal assistant also handles some paralegal work, can that work be billed?

6. Would you look at my fee agreement? Would you talk to me about retainers?

7. How can I more effectively market my practice?

8. A lawyer is leaving our firm; can you help me with client notification, accounts receivable and the transfer of files?

9. I am planning to retire and wish to (sell or close) my practice; can you help me with the planning and with finding resources?

10. Which practice management systems are the best?

The answers to these and many other questions are on the LOMAS website: *www.floridabar.org/tfb/TFBMember.nsf/840090c16eedaf0085256b61000928dc/2ce4258d54fcadcb85256fd5005c36d9?OpenDocument*. If you are unable to find the answer to your question on the LOMAS website, you can call or email LOMAS staff. The administrative assistant's number is 850/561-5611, and her email is *dferrell@flabar.org*. When

LOMAS
from preceding page

you contact LOMAS for an answer, remember there are only three LOMAS employees (yes, LOMAS does all its work with only three employees), so answers may take a couple of days, depending on the question's complexity and the staff's travel schedule.

4. **Practice Management Consultations.** If an attorney, law firm or government legal office needs additional practice management assistance, they can contact LOMAS and request a general management or technology consultation. Upon request, LOMAS assigns a practice management advisor to help evaluate the firm or office or a particular process within an office and provides a candid report identifying problems and fixes, as well as the processes the firm does well. LOMAS charges for these evaluations, but the cost is worth it. I had a practice management evaluation when I opened my firm. That evaluation and the information I received is the best investment for my firm I have made.
5. **Career Counseling.** Finally, LOMAS understands that not everyone manages a firm or is opening a law practice. For Bar members looking for a job or seeking employees, LOMAS assists The Florida Bar in maintaining the Career Center: *http://l.fl.bar.associationcareernetwork.com/Common/HomePage.aspx*. This service allows employers to post employer profiles and advertise jobs to The Florida Bar's membership. It also allows job seekers to post resumes and search for jobs posted by employers. If you are unable to find a job through the Career Center, LOMAS maintains a list of other job-related sites for lawyers at *www.floridabar.org/tfb/TFBMember.nsf/840090c16eedaf0085256b61000928dc/37f5d30a9d7137178525764200707 9ca!OpenDocument*. If you need additional help in your job search, LOMAS provides free monthly group career counseling sessions with a professional career counselor via GoToMeeting. For more information on the career counseling, visit the LOMAS website.

***Twyla Sketchley, BCS**, is a Florida Bar board certified elder law attorney with The Sketchley Law Firm PA in Tallahassee. She is chair of The Florida Bar Law Office Management Assistance Service (LOMAS) Advisory Board and immediate past chair of the Elder Law Section. She has run her own elder law firm since 2002 and provides law practice management consulting and coaching to solo and small firms.*

Practical practice management: Five books to help you improve your law practice

by Twyla L. Sketchley

Do you struggle with the business or management side of the practice of law? Most attorneys do. We became attorneys for reasons other than the business of practicing law. This is not to say that some attorneys are not amazing businesspeople. If you are, then you probably need to be reading something other than this column.

However, for those of us who are not natural businesspeople, we can always use a little assistance. These five books provide help with every aspect of practice management. Each is well organized and easy to read with information in short chapters, bullet points and bite size advice.

1. ***Collecting Your Fee: Getting Paid from Intake to Invoice***
   by Edward Poll

Collecting Your Fee provides advice, tips and guidance for adjusting your law firm processes to make collection of your fees easier. It also provides forms to supplement your office processes and make it less painful to bill and collect earned fees, retainers and deposits. This is a soft back book with a CD of forms.
Available through the LawBiz Bookstore, $79.00
Available through the American Bar Association Bookstore, $79.95
ABA Membership discounts available

2. ***Coaching for Attorneys: Improving Productivity and Achieving Balance***
   by Cami McLaren & Stephani Finelli

Coaching for Attorneys provides advice and suggests solutions for common problems lawyers face in their law practices as well as their struggle to balance work with the rest of life. The book helps address specific problems by helping the lawyer find options, evaluate them in the lawyer's circumstances and develop an action plan.

Five books
from preceding page

Available through American Bar Association Bookstore, $49.95
ABA Membership discounts available

3. *How to Start & Build a Law Practice (Fifth Edition)*
by Jay G. Foonberg

How to Start & Build a Law Practice is the bible of law practice management. There are many books you can buy to supplement this book, but your library is incomplete without it. According to author Jay Foonberg, the guru of practice management, the purpose of this text is to provide a single book to assist attorneys with starting their law practices. It will help you evaluate whether you should go to work for a firm or start you own. Either way, it provides a lawyer with an understanding of how a law firm operates (or should operate), from the case numbering system to the firm's financial dashboard.
Available through the American Bar Association Bookstore, $69.95
ABA Membership discounts available

4. *Secrets of the Business of Law*
by Edward Poll

Secrets of the Business of Law is an easy-to-read roadmap of the basic parts of a law practice. The advice and tips are boiled down into their most useful form. The book stresses the importance of planning and understanding where the lawyer is and where he or she is going. The book even includes a basic discussion of professional liability, insurance rates and options. This is a great book to carry in your briefcase and read snippets while waiting for hearings.
Available through the LawBiz Bookstore, $49.00

5. *Women Rainmakers' Best Marketing Tips*
by Theda C. Snyder

Women Rainmakers' Best Marketing Tips is a collection of easy-to-read hints, suggestions and strategies to help any lawyer develop a practical marketing plan and execute it. Many of the suggestions target use of a law firm's current resources, creating low or no cost marketing options. The book has enough suggestions and tips that any lawyer, regardless of personality, can develop a strong, workable marketing strategy.
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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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COMMITTEE REPORTS

Exploitation and Abuse Committee

Carolyn H. Sawyer and Angela Warren, co-chairs*

This year's committee is moving ahead with its efforts to promote meaningful communication and collaboration between the Elder Law Section and other groups and agencies in the fight against the exploitation of the elderly. The focus is on two projects:

Project 1: Partnering with State Representative Kathleen Passidomo to formulate changes in statutory law to strengthen our ability to prosecute exploiters

This effort began last year though telephone conferences with a small working group that included representatives from law enforcement, prosecutors and elder law attorneys. Eventually a bill was drafted that later died in the session without being put to a vote.

This year a more structured Exploitation Task Force with an expanded membership was put together by Robert Anderson, director of adult protective services, Department of Children & Families. The members included not only last year's participants but also additional members from the State Attorney's Offices. Issues were delineated with written input from all members after every teleconference. This was followed by a full-day, face-to-face meeting at the office of Prosecutor Richard Sherman in Fort Lauderdale. Shannon Miller did a great job of representing our committee.

Shannon gave an excellent presentation and explanation of the resulting recommendations of the task force during the committee's telephone conference call on Oct. 25, 2013. Described as "groundbreaking," the proposed changes were submitted to Rep. Kathleen Passidomo (R-Naples). The resulting bill, House Bill 409, contains major changes. The identical companion bill is SB 588.

Section 1 introduces a hearsay exception to inadmissibility of an out-of-court statement by an elderly person or a disabled adult describing any act of abuse, neglect, exploitation or other violent act. This would first require that the court find in a hearing outside the presence of the jury that the time, content and circumstances of the statement provide sufficient safeguards of reliability. The court may exercise its discretion in the factors considered, such as reliability and the nature and duration of the offense. Unavailability of the elderly person or disabled adult to testify can include a finding by the court that the individual's participation in the trial would result in substantial likelihood of severe emotional, mental or physical harm.

Section 2 eliminates the requirement of "deception" and "intimidation" in the definition of exploitation as defined in F.S. 825.103. Prosecutors on the task force were unanimous in stating that this change will remove an onerous obstacle to successful prosecutions of exploiters.

Section 3 both extends and sharpens the section on breach of fiduciary duty by redefining unlawful appropriations as occurring when the elderly or disabled person does not receive reciprocal financial value in goods or services. It goes on to include violations of certain delineated duties of agents, guardians and trustees. Also addressed are joint accounts in which an elderly person or the disabled adult was the sole contributor and payee of the funds.

Another new provision introduces a permissive presumption of a transfer of $10,000 or more from a person age 65 or older to a nonrelative whom the transferor knew for fewer than two years before the transfer and for which the transferor did not receive reciprocal value that the transfer was the result of exploitation. This applies to a criminal case. If the trial is by jury, jurors are to be instructed that they may, but are not required to, draw an inference of exploitation upon proof beyond a reasonable doubt of the facts listed in the subsection of the statute.

The legislative committee of the Elder Law Section, chaired by Scott Selis, and AFELA have pledged full support for the bills.

Project 2: Joint workshop on elder exploitation

Our second project for the year is the next joint workshop on elder exploitation with the Office of the Attorney General. This will be the third workshop we have co-sponsored as a committee. This year the three-day event is scheduled for May 12-14, 2014, at the Embassy Suites in Altamonte Springs. Margaret Boeth from the AG's office is working with us to set up the agenda. We believe we will have stronger support and participation from DCF this year as well as from other agencies such as the Department of Financial Services.

To make the most of this wonderful opportunity to network and brainstorm, we need to find ways to get the word out about the meeting. We have heard from members of law enforcement, for example, that they did not know about this meeting in time to attend.

*Carolyn Sawyer recently stepped down as co-chair. Amy Mason Collins has been named co-chair with Angela Warren.

Guardianship Committee Report

Carolyn Landon and Victoria Heuler, co-chairs

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The Guardianship Committee meets the second Wednesday of every month at 12 noon by telephone.

Committee reports
from preceding page

There are currently two bills of interest to the Guardianship Committee.

House Bill 123 by Rep. Elaine Schwartz (D-Hollywood) provides that fees and costs incurred by an attorney who has rendered services to a ward in compensation proceedings are payable from guardianship assets; provides that a court may appoint a guardian ad litem to a minor if necessary to protect the minor's interests in a settlement; provides that a settlement of a minor's claim is subject to certain confidentiality provisions; directs that the examining committee be paid from state funds as court-appointed expert witnesses if a petition for incapacity is dismissed; requires that a petitioner reimburse the state for expert witness fees if the court finds the petition to have been filed in bad faith.

House Bill 635 (known as the Clerk's Bill), introduced by Rep. Kathleen Passidomo (R-Naples), redefines the term "audit"; requires nonprofessional guardian to submit to credit history investigation and background screening; authorizes the court to order accounting of property or trust of which ward is beneficiary but which is not under administration or control of guardian; authorizes clerk to obtain and review records impacting guardianship assets and to issue subpoenas upon application to court; provides for removal of guardian for failure to submit records during an audit; provides that person seeking appointment as guardian may not lawfully deny or fail to acknowledge arrests covered by sealed record.

Legislative Committee

Scott A. Selis and William Johnson, co-chairs

The Legislative Committee is monitoring a few bills of interest this year that we will follow, oppose and/or support during the legislative session. Topics of interest are bills that will:

- Leave the unauthorized practice of law statute toothless;
- Make recovery of fees in guardianship proceedings extremely difficult; and
- Better protect the elderly from exploitation by modifying the elements of the criminal statute.

UPL Committee

John R. Frazier, chair

Update on proposed advisory opinion addressing Medicaid planning activities by non-lawyers

On Jan. 16, 2014, The Florida Bar Standing Committee on the Unlicensed Practice of Law filed with the Florida Supreme Court a proposed advisory opinion that addresses the Medicaid planning activities of non-lawyers. The Elder Law Section will be represented by attorney Robert Sondak of Miami during the proceedings. Mr. Sondak has extensive experience in dealing with Florida UPL matters, and the Elder Law Section is grateful for his expertise.

As of the writing of this article, three briefs have been filed with the Florida Supreme Court regarding the proposed advisory opinion. Florida Legal Services Inc. has filed a brief in qualified support of the proposed advisory opinion. Two non-attorneys have filed briefs in opposition to the proposed advisory opinion.

Despite the filing of the proposed Medicaid planning advisory opinion, the Elder Law Section Unlicensed Practice of Law Committee continues to receive regular reports of alleged unlicensed practice of law activity. The UPL Committee also continues to receive reports of attorneys allegedly preparing legal documents for the clients of non-attorneys, where the attorney may have little or no involvement with the client. These reports are not limited to Medicaid planning activities. The reports also include allegations that this type of document preparation activity is occurring in the VA planning context (regarding the preparation of irrevocable trusts) and in the estate planning context (regarding the preparation of living trust documents).

It is important for all of us to remember that the Florida Bar UPL investigative process is a "complaint driven" process under Florida Bar rules. Accordingly, it is the responsibility of attorneys and aggrieved members of the public to bring alleged UPL matters to the attention of The Florida Bar, in order for the Bar to take action.

The ELS UPL Committee will continue to provide updates as the Medicaid planning advisory opinion process moves forward. If you wish to contact me, please call 727/586-3306, ext. 104, or send an email to *john@attypip.com*.

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Annie get your gun trust

The tale: Your longtime client, Annie Oakley, has a large gun collection. She recently confided to you that she is interested in purchasing weapons that are subject to the National Firearms Act (NFA). You have already discussed the delicate issues that surround firearms in an estate. In addition to the liability, the potential for legal problems are multiplied by possessing NFA-restricted items. She wants your advice.

The tip: Firearms subject to the original 1934 NFA included shotguns and rifles having barrels less than 18 inches in length, certain firearms described as "any other weapons," machineguns and firearm mufflers and silencers. Title II of the Gun Control Act of 1962 amended the NFA definitions of "firearm" by adding "destructive devices" and expanding the definition of machinegun. These weapons require that certain ATF (Bureau of Alcohol, Tobacco, Firearms and Explosives) forms be completed, including fingerprinting, a photograph and a tax paid. In addition, a law enforcement certification is also required. This is a signature from your local chief law enforcement officer (CLEO). The forms must be approved by the ATF before the transfer may be made. This poses an added burden on the personal representative as to timing issues and if one of the intended beneficiaries cannot pass the required background check to be approved to receive the bequest.

Your solution is to recommend a gun trust. This is not the same as your client's existing revocable trust, which holds her real estate and other assets and sets up trusts for her children. No, this trust is specifically for her current gun collection and for the firearms restricted under the NFA that she may purchase in the future.

Tips & Tales

by Kara Evans

It is important to understand the restrictions on the registration and use of the firearms to appreciate the usefulness of a gun trust. We have already reviewed the registration requirements for an individual. How would the registration differ with a gun trust? First of all, it is pretty difficult to fingerprint and photograph a trust, although you will have to provide a copy of the document. Additionally, the trust will not have a criminal record, and so there will be no need for the CLEO to sign off on the application. You still must pay the $200 application fee, which, by the way, has not changed since 1934!

How else will a gun trust help? Well, technically, the only person who can use an NFA-registered item is the person to whom it is registered. You are aware that your client often goes to the range with her children and spouse and that they share the guns between them. In addition, should there be a home invasion and the weapon used to deter the invader was registered to your client but was used by the client's son, then technically your client could be prosecuted under the NFA for a constructive transfer. With a gun trust, any of the named co-trustees has the authority to use the items registered to the trust. Because the trust is revocable and hence amendable, you can add trustees at will. Lastly, should one of the trustees lose the right to own firearms, the weapons would not be subject to confiscation because they are owned by the trust and not by the individual whose rights were revoked.

A gun trust will not allow you to own guns or other items that are prohibited under your state law. But as with other trusts, there will be no probate on these items, sparing your less than knowledgeable personal representative from the problems of having NFA items in the estate.

Call for papers – *Florida Bar Journal*

John S. Clardy III is the contact person for publications for the Executive Council of the Elder Law Section. Please email John at *clardy@tampabay.rr.com* for information on submitting elder law articles to The Florida Bar Journal for 2013-2014.

A summary of the requirements follows:

- Articles submitted for possible publication should be MS Word documents formatted for 8½ x 11 inch paper, double-spaced with one-inch margins. Only completed articles will be considered (no outlines or abstracts).
- Citations should be consistent with the Uniform System of Citation. Endnotes must be concise and placed at the end of the article. Excessive endnotes are discouraged.
- Lead articles may not be longer than 12 pages, including endnotes.

Review is usually completed in six weeks.

Avoiding unnecessary litigation with a client of questionable capacity

by Joshua H. Rosenberg


JOSHUA ROSENBERG

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We all get calls from potential clients wanting something as "simple" as a durable power of attorney or a basic will. Unfortunately, many times the procedure for drafting and completing those documents is anything but "simple." There are complex legal and ethical issues pertaining to undue influence and capacity that are easily missed. These issues are particularly difficult in wealth management planning. Failing to pay close attention can lead to avoidable disasters. Whether in wealth management planning or the drafting of other related documents, by following basic guideposts, one can ensure the execution of a client/loved one's wishes and stop the creation of unnecessary litigation in the future.

If you aren't comfortable, don't do it. If the call you are getting is outside of your usual area of expertise, recognize that ethical issues pertaining to estate planning are strikingly complex. They seem simple—until there is a problem. Once you realize there is a problem, it's likely too late for a simple fix. Before you have an issue, call practitioners who specialize in elder law, guardianship, probate, wealth planning and/or estate planning. The longer you wait to deal with issues, the more difficult they are to resolve. For example, once family members are involved with planning, it is nearly impossible to remove the specter of undue influence. Cases that have allegations of undue influence or incapacity are common to those who practice in these areas. No matter how bizarre the fact pattern is to you, those who are involved with these cases every day have heard similar stories. There is no fee worth a claim of malpractice, being called as a witness or having your reputation tarnished by disgruntled family members.

Remember the case of *In re Carpenter*, 253 So.2d 697 *(1970)* for undue influence questions! The *Carpenter* decision is the lodestar for the factors constituting undue influence. The most important questions are: was the beneficiary present when the document was executed; who was present when the client requested the document; who recommended the drafting attorney; what is the beneficiary's knowledge of the contents prior to execution; who provided the attorney with direction for drafting the documents; and did the beneficiary hold the documents after execution. If you see potential litigants like children of a prior marriage or a new, much younger companion, pay special attention to their role or involvement. Avoiding the *Carpenter* pitfalls serves the interests of all interested persons—the drafting attorney, beneficiaries and the client.

Be clear who your client is. In the case where there is questionable capacity and/or concerns about undue influence, one must be clear that the testator is the *only* client. Keeping this in mind provides a foundation to avoid *Carpenter* problems. Don't meet or talk with others, even if the client requests it. If someone else must drive the client to your office, ask that it not be the person receiving a beneficial interest. The less you have to do with "outsiders," the more likely your documents will be respected later. If the client refuses to abide by your rules, decline the representation.

Trust your gut. If you believe there is a potential issue of lack of testamentary capacity, don't ignore it. A simple solution is to hire a mental health professional, such as a neurologist, psychiatrist or psychologist. Drafters are not doctors. Get a *written* professional opinion from a medical expert as to testamentary capacity. The closer in time that the report is made to the execution of the document, the better. Consider using guardianship examining committee members to evaluate your client. The examining committee members are familiar to the court and may help in case of a dispute. If the client refuses to be evaluated, this speaks volumes about your concerns.

Even if your client is incapacitated, there are alternatives. The standards for legal incapacity under Chapter 744 are far different from standards for testamentary capacity. If your client is incapacitated, you need to have a guardianship established. Once that is done, you may ask the court for permission to evaluate the client for testamentary capacity. In some cases, the court will authorize

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Questionable capacity
from preceding page

the legally incapacitated adult to engage in estate planning. Even if your client lacks testamentary capacity, a guardian may engage in certain forms of estate or wealth management planning on behalf of the ward. Florida Statutes § 744.441(19) provides the guardian with authority to "create or amend revocable trusts or create irrevocable trusts of property of the ward's estate." After court authority is granted, the guardian has the opportunity to undertake special needs, wealth management and estate planning for the incapacitated person. Because the client's guardian has obtained court authorization, notice has been provided and a chance to object has been given. Therefore, nearly all issues pertaining to undue influence and/or capacity have been judicially resolved *before* the document preparation takes place.

Encourage your client to make the plan known. The more your client tells those affected by the new documents or the wealth management plan, the better. Litigation is most likely when people are surprised.

Joshua H. Rosenberg *is a partner with the law firm of Markowitz, Ringel, Trusty & Hartog. He focuses on guardianship litigation/administration, probate litigation/administration and estate planning. He may be reached at jrosenberg@mrthlaw.com.*

Special Needs Trust Fairness Act seeks to correct error in current legislation

by Vanessa J. Skinner


VANESSA SKINNER

Reprinted from Orange County Bar Association's (OCBA) publication, The Briefs.

Senator Bill Nelson (D-FL), chair of the Senate Special Committee on Aging and member of the Senate Finance Committee, along with Senators Chuck Grassley (R-IA), Jay Rockefeller (D-WV) and Mike Enzi (R-WY), has introduced the National Academy of Elder Law Attorneys' (NAELA) Special Needs Trust Fairness Act in the United States Senate. Earlier this year, Representatives Glenn Thompson (R-5th-PA) and Frank Pallone (D-6th-NJ), the ranking member on the House Energy & Commerce Subcommittee on Health, introduced the companion bill in the United States House of Representatives (H.R. 2123). This new legislation seeks to correct what appears to be a drafting error in existing federal law, which presumes that a person with disabilities lacks the equality or mental capacity to independently create a certain type of special needs trust (SNT).

In 1993, Congress added the concept of a SNT to the Omnibus Budget Reconciliation Act of 1993 (OBRA 1993). A SNT is designed to aid disabled individuals who receive Supplemental Security Income (SSI) benefits at the federal level and/or Medicaid health benefits at the state level in preserving their assets and using such assets to enhance their quality of life by paying for health care expenses and other daily living expenses, such as toiletries and entertainment, that are not covered by their government benefits.

Both SSI and Medicaid are needs-based benefits and, therefore, in order to receive such benefits, a person must meet certain financial thresholds. The assets held in a SNT are not counted when determining if the person has more than the $2,000 in allowed countable assets for either of these benefits programs. In exchange for this exclusion of the SNT from the asset calculation, upon the death of the disabled individual, the state is reimbursed from the trust assets for the Medicaid benefits paid to the individual during his or her lifetime.

This payback provision must be included in SNTs that are funded with the assets of the disabled beneficiary—(d)(4)(C) pooled trusts and (d)(4)(A) trusts. The former type of SNT is administered by a nonprofit organization, and each disabled individual has his or her own subaccount within the trust; however, the trust assets are pooled together for investment purposes. The latter type of SNT, which is frequently used when the disabled individual is the recipient of a legal settlement, is managed by a trustee, including a family member, for the sole benefit of the disabled individual.[1]

The Special Needs Trust Fairness Act of 2013 seeks to address the disparity in the current legislation regarding who can establish (d)(4)(A) and (d)(4)(C) trusts. In addition to the provisions established by OBRA 1993, USC § 1396p(d)(4)(A) provides that a d(4)(A) trust must be established by a parent, grandparent, legal guardian of the individual or a court. Noticeably absent from this list of approved individuals is the disabled individual. Therefore, a disabled individual cannot create his or her own (d)(4)(A) trust even if he or she is mentally competent. In contrast, USC § 1396(d)(4)(C) provides that a (d)(4)(C) trust must be established by a parent, grandparent, legal guardian of such individual, the individual or a court. Therefore, (d)(4)(C) pooled trusts allow the disabled individual to create the trust. There does not appear to be

Special needs trust
from preceding page

any reason why "by the individual" was left out of USC § 1396p(d)(4)(A), yet included in § 1396(d)(4)(C). It is believed this omission was simply a legislative drafting error during the writing of OBRA 1993.

As a result of this legislative error, disabled individuals who have the requisite mental capacity, yet may not have a living or willing parent or grandparent to create their (d)(4)(A) trusts, are forced to petition the court in order to get these trusts established, a process which can take a significant amount of time and result in thousands of dollars of unnecessary legal costs for the disabled individuals. The Special Needs Trust Fairness Act seeks to amend Title XIX of the Social Security Act to extend the Medicaid rules regarding supplemental needs trusts for Medicaid beneficiaries to trusts established by those beneficiaries. In particular, it provides that Section 1917(d)(4)(A) of the Social Security Act (42 USC § 1396p(d)(4)(A)) is amended by inserting "the individual," after "for the benefit of such individual by." The amendment shall apply to all trusts established on or after the date of the enactment of the Special Needs Trust Fairness Act.

"The Special Needs Trust Fairness Act is a common sense solution that will save individuals with disabilities from unnecessary legal costs and time spent in petitioning the courts, and gives them back their dignity and constitutional right," states NAELA board member Michael Amoruso, Esq. He continues, "Without this bill, I, a blind and moderately deaf attorney who regularly drafts SNTs for clients, would not be able to sign my own SNT in the future."

Vanessa J. Skinner *is an attorney with the law firm of Winderweedle, Haines, Ward & Woodman PA, practicing in the firm's Winter Park office. Her practice focuses on estate planning, elder law, probate and trust administration, as well as corporate and litigation matters. She is an accredited attorney for the preparation, presentation and prosecution of claims for veterans' benefits before the Department of Veterans Affairs. She may be reached at 407/246-6584 or vskinner@whww.com.*

Endnote

1 A third type of SNT, called a third-party SNT, need not include the mandatory payback provision to the state as these SNTs are funded with the assets of the disabled individual's family members, rather than those of the disabled individual.

Member News

Palm Beach County Special Olympics names Karp Law Firm Volunteer Group of the Year

The Palm Beach County Special Olympics Committee has named The Karp Law Firm as 2013 Volunteer Group of the Year. The attorneys and staff of the firm have assisted special-needs athletes at the organization's Special Olympics Games for several years. Representatives of the firm accepted the award at the Special Olympics Annual Banquet on Nov. 8, 2013, in West Palm Beach. The Karp Law Firm is an estate planning/elder law firm with offices in Boynton Beach, Palm Beach Gardens and Port St. Lucie.

L-R: *Elizabeth Lebron, client coordinator; Khristina Iwasz, estate planning paralegal; attorney Joseph S. Karp; Zamara Rosete, assistant case manager; Audrey Yeager, law firm administrator; and Margaret Sajiun, estate planning paralegal*

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Alleged incapacitated person's right to notice and preference in appointment of guardian

by Alex Cuello


ALEX CUELLO

Once a petition to determine incapacity has been filed, the court cannot dismiss the petition without first considering the examining committee reports.[1] "There is a good reason for such a rule. If a person is incompetent, it is the duty of the court to assure that person's protection and that his or her autonomy is respected to the greatest extent possible."[2] Furthermore, "the statutes and rules do not provide for the dismissal of a petition to determine the incapacity of an individual before the actual determination of the issues."[3] What the Florida Probate Rules do require is that reasonable notice of all matters to be heard by the court must be provided to the parties in guardianship proceedings.[4] Specifically, the notice of hearing and a copy of the petition to determine incapacity must be served on the alleged incapacitated person (AIP).[5] "No response pleading is required, and no default may be entered for failure to file a responsive pleading."[6]

The AIP's capacity is presumed, absent an order adjudicating incapacity.[7] And judicial finding of incapacity must be based on clear and convincing evidence.[8] However, before the appointment of a guardian, but after a petition to determine incapacity has been filed, the court may appoint an emergency temporary guardian (ETG). If at the time of the hearing on the petition for incapacity no one has filed a petition for the appointment of a guardian, the court may appoint an ETG.[9] Specific findings that there appears to be imminent danger to the physical or mental health or safety of the AIP is required to warrant the appointment of an ETG.[10] "Unless the court orders otherwise, notice of filing of the petition for appointment of an emergency temporary guardian and any hearing on the petition shall be served before the hearing of the petition on the alleged incapacitated person and on the alleged incapacitated person's attorney."[11] "The right to reasonable notice … implicates constitutional due process concerns."[12] "While there are no hard and fast rules about how many days constitute a 'reasonable time,' the party served with notice must have actual notice and time to prepare."[13]

"The appointment of a guardian is a discretionary act of the trial court, which must be supported by logic and justification and founded on substantial competent evidence."[14] In appointing a guardian, the court shall consider the wishes expressed by an incapacitated person as to who shall be appointed guardian.[15] "Where a ward's preference as to the appointment of a guardian is capable of being known, that intent is the polestar to guide probate judges in the appointment of their guardians." *In re: Estate of Salley*, 742 So.2d 268 (Fla. 3rd DCA 1997). In *Salley*, the Third District Court of Appeal remanded and directed the lower court to appoint as guardian the person nominated by the AIP in a pre-need guardian designation executed after a petition to determine incapacity had been filed. Introduction of the declaration of pre-need guardian in an incapacity proceeding establishes a rebuttable presumption that the designee is entitled to serve as guardian.[16] However, the court must first make a definitive ruling regarding the competency of the ward to make a pre-need guardian designation.[17] "[T]he appropriate test for determining whether a ward was competent to make a decision regarding who will be her pre-need guardian is whether the ward had the capacity to generally understand the nature of the decision she is making and its implications."[18] This may be demonstrated by preponderance of the evidence, which is the same burden required for restoration of rights[19]; as compared to incapacity, which requires clear and convincing evidence.

If the court definitively finds that the ward had capacity to execute the pre-need guardian designation, there is a rebuttable presumption that the pre-need guardian is entitled to serve.[20] The presumption may be overcome by a specific, factually supportable finding that appointing the designated pre-need guardian would be contrary to the best interest of the ward.[21] In other words, "how is the appointment of the ward's chosen guardian sufficiently 'contrary' to her best interest that the court should disregard the ward's choice and appoint someone else?"[22] To make this determination, the court should considered whether "specific actions/inactions of the designee are sufficiently egregious as to be 'contrary to' the 'best interest' of the ward thereby justifying a change in the status quo."[23] On appeal the trial's appointment of a guardian will be tested under an abuse of discretion standard of review.[24]

All too often the only "evidence" presented to the court in support of the order appointing an ETG is the allegation stated in the petition for appointment of emergency temporary guardian. Once the petition to determine incapacity is filed, there

AIP's right to notice
from preceding page

is no turning back. The court cannot dismiss the petition without first considering the examining committee members' reports. Throughout the proceedings, the AIP has both constitutional and statutory rights to timely notice of all hearings. The AIP also has a statutory right, supported by case law, to express his or her wishes as to who shall be appointed guardian, which the court must take under consideration in appointing a guardian. If the court finds that appointment of a guardian is warranted and that the ward understood the nature and implication of designating the pre-need guardian, then there is a rebuttable presumption that the pre-need guardian is entitled to serve.

Alex Cuello, Esq., *is the principal shareholder of the Law Office of Alex Cuello PA in Miami. 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. He is board certified by The Florida Bar as a specialist in elder law. 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 Disability claims.*

Endnotes

1 *Jasser v. Saadeh*, 97 So.3d 241 (Fla 4th DCA 2012); *Borden v. Guardianship of Borden-Moore*, 818 So.2d 604 (Fla. 5th DCA 2002).

2 Id., *Jasser*, at 247.

3 Id.

4 Id., *Borden*.

5 5.550(b)(2), Fla.Prob.R.

6 Id.

7 *Baskin v. Sherburne*, 520 So.2d 103 (Fla. 2d DCA 1988); *Travis v. Travis*, 87 So. 762 (Fla. 1921).

8 §744.331(6), F.S.

9 §744.344(4), F.S.

10 §744.3031, F.S.

11 5.648(b), Fla.Pro.R.

12 Id., *Borden,* at 607.

13 Id., at 606 (citing *Crepage v. City of Lauderhill*, 744 So.2d 61 (Fla. 4th DCA 2000).

14 *In Re: Guard. of Koshenina*, 39 FLW 225a (Fla. 1st DCA 2014). (citing *Morris v. Knight*, 1 So. 3d 1238 (Fla. 2d DCA 2009).

15 §744.312(3)(a), F.S.

16 §744.3045(4), F.S.

17 *In Re: Guard. of Koshenia*, 39 FLW 225a (Fla.1st DCA 2014).

18 *Id.*

19 *In Re: Guard of Branch,* 10 FLW Supp. 23a (Cir. Ct. 2nd Jud. Cir. 2002)

20 *Id. Koshenia.*

21 *Id.*

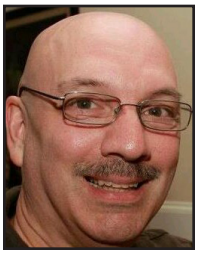
22 *Id.*

23 *Id.*

24 *Id.*, and *Miller v. Swan*, 958 So.2d 952 (Fla 4th DCA 2007).

Elder Concert 2014 means professional and business growth

by Al Rothstein


AL ROTHSTEIN

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Summary of selected case law

by Diane Zuckerman

Standing in guardianship cases

Julian Bevins, Appellant, v. Curtis Rogers, as Limited Guardian of the Person and Property of Oliver Bivins, an Incapacitated Person, Appellee. No. 4D12-4204 (4th DCA 2014)

In its ruling, the Fourth DCA circumscribes limits to the often cited *Hayes v. Guardianship of Thompson*, 952 So. 2d. 498 (Fla. 2006), which addresses the issue of standing in guardianship cases. Here, the son of a Florida ward petitioned the court for a change of the ward's residence to Texas to be closer to family. The guardianship had been established a year earlier, and a guardian had been delegated the right to determine the ward's residence, among other rights. The ward's guardian moved to dismiss the petition to change the ward's residence, arguing that the son did not have standing to file the petition.

The son relied on the *Hayes* case, arguing that he was next of kin and an interested person as heir to the ward's estate. The trial court held that *Hayes* gave interested persons the right to object to a petition to change the residence if filed by the appointed guardian but did not give him standing to initiate such a proceeding.

The trial court concluded that Florida Statutes § 744.2025(1) did not authorize anyone other than the guardian to petition for court approval to change a ward's residence. The court also noted that under the guardianship statutory scheme, a next of kin would have the right to petition for interim judicial review under Section 744.3715(1) if the guardian failed to act in the ward's best interest and to petition for the guardian's removal under Section 744.477.

The Fourth District concluded that although *Hayes* gives standing to interested persons to receive notice of guardianship proceedings and the right to object to guardianship reports, it should not be interpreted expansively to allow next of kin to *initiate* guardianship proceedings for change of residence.

The take-home message for attorneys who represent next of kin is that once a guardianship is established, the remedies of the non-guardian family member who seeks control with respect to the ward are limited. For clients who are considering whether to take on the role of guardian, they should be advised of these limitations should someone else be appointed the legal guardian.

Attorney's and examining committee members' fees

Marion Yazdik, as Personal Representative of the Estate of Mary W. Klatthaar, Deceased, v. Mark Scott; Michael J. McGarry; Virderie B. Kaminska RN; Cora S. Taylor, Psy. S. LMHC PA; and Douglas J. Shadle M.D. Case No. 2D12-4451 (2nd DCA 2014)

Upon the filing of a petition to appoint an emergency temporary guardian and a petition to determine incapacity, the circuit court appointed Michael J. McGarry to represent the ward and appointed appellee examining committee members to evaluate the alleged incapacitated person, Mary Klatthaar. The trial court denied the petition for appointment of emergency temporary guardian, and prior to the hearing on the petition to determine incapacity, the ward died. Apparently, the examining committee members performed their evaluations and McGarry completed his work prior to Klatthaar's death.

The petitioner, Mark Scott, was represented by attorney Pamela Keller. Both she and McGarry petitioned the court for an order awarding their fees from the decedent's estate and also sought payment of the examining committee members on their behalf. The trial court awarded the fees, and Marion Yazdik, the personal representative of Klatthaar's estate, challenged the orders awarding fees and costs.

The statutes at issue were Florida Statutes § 744.108, providing for the attorney's fees for petitioner, and Section 744.331, providing for payment of the court appointed attorney and the examining committee members. The Second District analyzed these statutes separately.

Section 744.331 provides that the court appointed attorney and examining committee members shall be paid by the guardian of the property of the ward. The court cited other cases: *Faulkner v. Faulkner*, 65 So. 3d. 1167, (Fla. 1st DCA 2011); *Ehrlich v. Allen*, 10 So. 3d. 1210 (Fla. 4th DCA 2009); and *Levine v. Levine*, 4 So. 3d 730 (5th DCA 2009), which disallow fees when the petition to determine incapacity is dismissed. The court saw no distinction between the situation in which an alleged incapacitated person died and a dismissal, given that both resulted in a guardian not being appointed. Therefore, Section 744.331 would not apply to awarding fees from the ward.

With regard to Section 744.108, which entitles guardians and attorneys who have rendered services to the ward to a reasonable fee, the Second District concluded that this statute was not triggered because a guardian was never appointed.

Since neither statute applied, along with the fact that Florida follows the American Rule, which allows attorney's fees only when authorized by statute or agreement, the Second District reversed the trial court's award of fees.

As a practice tip, when representing a petitioner who seeks a determination of incapacity, one should seek

payment directly from the petitioner and condition such payment on a determination of incapacity.

Jurisdiction

Christopher S. Mack, Charles T. Mack and Kathleen Mack v. M. Maureen Polsby M.D., individually and as Trustee of Charles C. Mack Revocable Trust. Case No. 3D13-1227 (3rd DCA 2014)

This case involves a dispute between siblings regarding a revocable living trust for their father created and funded at the time he was in a coma. Charles C. Mack suffered a stroke and was comatose. His daughter, Maureen Polsby, petitioned the court to be appointed as the temporary emergency guardian, which the court granted. In her role as temporary guardian, she filed an emergency amended petition to create and fund a revocable trust. The pleading notified the court that Charles Mack's medical condition was critical and argued that it was in his best interest to establish an estate plan via a revocable living trust.

The trust at issue nominated Polsby as trustee and contained unusual language allowing her discretion to withhold distributions to her siblings. The trust stated she could suspend payments to her siblings if she "reasonably believes" that they are "incapable of caring for himself or herself or is likely to dissipate his or her financial resources." The trust named the four siblings as equal beneficiaries.

At the hearing granting the emergency petition to create a trust, the judge authorized Polsby to transfer their father's real property located in Michigan to the trust. The transfer was than effectuated. Charles Mack died a couple of months later. His son Christopher Mack was appointed as the personal representative by a Michigan court with respect to the Michigan property.

Christopher Mack then brought a cause of action against Polsby seeking a declaration that the trust was invalid, that she had breached her fiduciary duty and that sought removal of her as trustee. Polsby moved for summary judgment, arguing that the request to invalidate the trust was a veiled attempt to overrule the trial judge's ruling. Summary judgment was granted based on the finding that the court had no jurisdiction to review a predecessor's ruling, and the appeal followed.

The plaintiffs argued that the trial court was wrong and did have jurisdiction over the case. The court relied on Fla. R. Civ. P 1.540(b), which allows relief from a judgment procured by an opposing party's fraud, which had been alleged in the complaint. Since the issue of breach of fiduciary duty and the petition to remove the trustee arose after the creation of the trust, there was no jurisdictional barrier.

As a practice tip, jurisdictional issues should be reviewed carefully when accepting representation so that the client who faces a decision whether to litigate is properly informed.

Arbitration

Susan B. Gren, as Personal Representative of the Estate of Robert L. Gren III, v. Ellen Gren, as Personal Representative of the Estate of Robert L. Gren II and as the Successor Trustee of the Robert L. Gren II Living Trust dated July 2010. No. 4D13-1603 (4th DCA, 2014)

In this case, an ex-wife of a grantor of a trust, with whom she shared a son, filed a petition for construction of trust instrument, which was dismissed by the trial court. The grantor had created a living revocable trust, naming himself as current trustee and his current wife as successor trustee. The two named beneficiaries of the trust were the current wife and the grantor's son from his prior marriage. The son died three months after his father. Thereafter, the ex-wife of the grantor was appointed as the personal representative of their son's estate.

In the petition for construction of trust instrument, it was alleged that the trust language was unclear as to whether the son's estate was entitled to a half-share of the residue, given that he survived the father but died before the successor trustee deferred distribution of the residual trust estate.

In response to the petition, the successor trustee filed a motion to compel arbitration, which was granted. Six months later, the successor trustee filed a motion to dismiss with prejudice and bar any further related claims in arbitration. At the hearing, the successor essentially argued laches, in that the ex-wife had not moved to request arbitration, to choose arbitrators or to schedule the arbitration. The ex-wife conceded that she had filed for arbitration only the day before the hearing, but she argued that eight months' delay was not untimely, and if it were, the arbitrator, not the judge, should rule on the issue.

The trial court dismissed the ex-wife's petition for construction of trust instrument with prejudice; however, no basis for the dismissal was articulated by the trial court.

The ex-wife argued that the trial court had erred in the dismissal order because the determination of whether there was an unreasonable delay in setting arbitration to warrant a dismissal was an issue to be heard by the arbitrator. Further, she argued that such a delay should not warrant a waiver to arbitration. She also argued that the order compelling arbitration divested the trial court of any jurisdiction to rule on subsequent matters.

In reversing the trial court, the Fourth District noted that neither the trial court's order nor the arbitration provision addressed a time limit for the arbitration. It also stated that courts favor arbitration as an alternative to litigation. The Fourth District ruled that the issue of timeliness of a demand for arbitration was one to be decided by the arbitrator, not the judge. Therefore, the case was reversed and remanded to reinstate the ex-wife's petition and the ultimate arbitration of the contested dispute.

The take-home message here is to familiarize ourselves with arbitration procedure, the arbitration agreement and case law to avoid any unnecessary litigation regarding jurisdiction.

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Fair Hearings Reported

by Diana Coen Zolner

***Petitioner v. Florida Department of Children and Families*, Appeal No. 09F-04274 (October 2, 2009)**

The petitioner appealed the respondent's action in determining the amount of patient responsibility and the community spouse diversion amount in the Institutional Care Program (ICP) and Medicaid program for an application filed on July 6, 2009. The petitioner resides in a nursing facility and has a spouse who lives in the community in an assisted living facility (ALF). The petitioner has a total gross monthly income of $2,357.89. The community spouse's gross monthly income is $612.83. The couple's combined countable income after all allowable deductions is $2,928. The petitioner was initially over the income limit, and a qualified income trust (QIT) was established. A monthly deposit of $500 was being made to the QIT to allow the petitioner to become eligible for ICP benefits. The petitioner was approved for ICP benefits.

The community spouse was unable to continue living in the community and required custodial care in an ALF. Her monthly expenses at the ALF were $2,811. In addition to the nursing home and ALF expenses, the couple continued to maintain the home the wife had occupied prior to being admitted into the ALF. The home was for sale, but until its sale the couple continued to pay $155 per month in utilities and $208.33 per month in property taxes.

The respondent determined the amount of the community spouse allowance budget for the purpose of diverting funds from the patient responsibility to the community spouse to meet her needs. The allowance takes into consideration the community spouse's shelter cost. The respondent requested information from the ALF as to how much of the community spouse's base fee (room and board) was for her room and how much was for meals. The ALF would not break down the costs as requested, and as a result the total shelter cost for the wife's shelter used by the respondent was $0. The respondent did not recognize the costs of maintaining the unoccupied home of the community spouse.

The petitioner requested an additional diversion to the community spouse to cover the actual expenses of the ALF and the home. As a result of her placement in the ALF, the community spouse's expenses exceeded her income. Based on the authority of the Florida Administrative Code at 65A-1.7165(5)(c) ("Spousal Impoverishment Standards") and the dollar amounts for spousal impoverishment set forth in Appendix A-9 of the ACCESS Policy Manual, the respondent determined the community spouse allowance to be $1,209.17 and the patient responsibility to be $1,114.55. The respondent did not give the community spouse a deduction for the cost of maintaining the unoccupied home. The hearing officer did not address the correctness of this action because the cost of maintaining the home did not exceed the required 30 percent of the minimum monthly maintenance income allowance (MMMIA), and therefore there would be no deduction.

In addition to the Spousal Impoverishment Standards, the Florida Administrative Code at 65A-1.72(4)(f) permits possible adjustment to this methodology and the resulting income allowance as follows: "... the allowance may be adjusted by the hearing officer if the couple presents proof that exceptional circumstances resulting in significant inadequacy of the allowance to meet their needs exists. ... An example is when a community spouse incurs unavoidable expenses for medical, remedial and other support services which impact the community spouse's ability to maintain themself in the community and in amounts that could not be expected to be paid from amounts already recognized for maintenance and/or amounts held in resources." The hearing officer determined that this rule provides that the MMMIA may be increased if the community spouse has an exceptional circumstance. In this appeal it was determined that the community spouse's health deteriorated to such a point that she could not reside at home and required the assistance provided in an ALF. The hearing officer determined that her health met the requirement of an exceptional circumstance.

Next, the hearing officer needed to determine that the expenses related to the exceptional circumstance created significant financial distress. The hearing officer determined that the costs of the ALF substantially exceeded the community spouse's income, allowing for deviation from the MMMIA. Therefore, the hearing officer determined that the costs of the ALF must be considered in determining what amount, if any, should be diverted to the community spouse. Based on the circumstances of this case, the hearing officer determined that the community spouse diversion should be the remainder of the institutional spouse's income and that the reduced patient responsibility should be $0.

***Petitioner v. Respondent*, Appeal No. 09N-00183 (January 6, 2010)**

At issue in this appeal was whether the facility's intent to discharge the petitioner was correct due to the facility's inability to meet the petitioner's needs. The petitioner entered the facility on Nov. 1, 2005. In October 2009, the facility issued a discharge notice citing the reason for discharge as "needs cannot be met ... ." The facility reported that over the past year, the behavior of the petitioner had been a concern. The petitioner was repeatedly found in other patients' rooms

and had begun "hitting and yelling at staff." This agitation and combative behavior progressively worsened to the point where the facility determined that the petitioner would require continuous observation, one-on-one care and a locked unit in the near future. Continuous observation was ordered by the facility in an attempt to control the petitioner's adverse behaviors, and facility staff members provided one-on-one coverage of the petitioner throughout the day. As of the date of the hearing, the petitioner remained at the facility, and the facility staff continued with the intent to discharge. The facility's discharge plan was to relocate the petitioner to a more secure facility that would have a locked unit, and the notice of discharge named such a facility. The petitioner's family preferred an alternate location that would be closer for the petitioner's son to visit and that had a higher quality rating.

Transfer and discharge of residents is addressed at 42 C.F.R. § 483.12, stating in relevant part: "(2) Transfer and discharge requirements. The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless - (i) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility ... or (iii) The safety of the individual in the facility is endangered ... ." The regulations further provide that the resident's clinical record must be documented by a physician when transfer or discharge is necessary. Furthermore, the facility "must notify the resident and, if known, a family member or legal representative of the resident of the transfer or discharge and the reasons for the move in writing ... ." Such notice "must be made by the facility at least 30 days before the resident is transferred or discharged ..." and must include (i) the reason for transfer or discharge; (ii) the effective date of transfer or discharge; and (iii) the location to which the resident is transferred or discharged ... ."

Based on all of the evidence and testimony, the hearing officer concluded that the current facility could not adequately meet the individual care needs of the petitioner, as described in the facility's notice. The hearing officer further found that due to the petitioner's wandering and other behavioral concerns, another location that provided greater security was not only preferable, but was needed for proper care of the petitioner. In conclusion, the hearing officer stated that while the family might prefer a closer location and other favorable placement, the intended location had a secure section, was appropriately licensed and would be a permissible location for discharge. Therefore, the intent to discharge was justified, and the notice to discharge was upheld.

***Petitioner v. Agency for Health Care Administration (AHCA)*, Appeal No. 09F-07772 (February 4, 2010)**

The petitioner appealed the respondent's decision to deny retroactive disenrollment from the Medicaid Waiver Long Term Care Diversion Program (LTCDP) for the month of February 2009 and the respondent's decision to deny payment of the petitioner's February 2009 nursing home charges under the Institutional Care Program (ICP) Medicaid. The petitioner was enrolled in the Medicaid LTCDP from approximately March 2007 through February 2009, and the company contracted by the Department of Elder Affairs to provide the petitioner's LTCDP waiver services was American Eldercare.

In May 2008, the petitioner was transferred from an assisted living facility (ALF) to a rehabilitation facility due to weakness and dehydration. In January 2009, American Eldercare determined that the petitioner no longer needed rehabilitation therapy and should be transferred back to an ALF as soon as possible. The petitioner's son was informed of this decision by American Eldercare, and he, in turn, informed the company that he might want to disenroll the petitioner from the program and apply for ICP Medicaid coverage to allow his mother's nursing home care

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to continue. American Eldercare advised the son that since it was already Jan. 28, 2009, disenrollment would be effective Feb. 28, 2009, if he decided to disenroll the petitioner from the program. The son asked for an extension of time to make his decision, and American Eldercare extended its coverage for the petitioner through Feb. 2, 2009. On that date, the petitioner's son advised American Eldercare that he had decided to disenroll his mother from LTCDP and to seek ICP Medicaid so she could remain in the nursing home. A disenrollment form was sent to the petitioner's son, which he completed and returned to American Eldercare on Feb. 4, 2009. American Eldercare submitted the proper forms to the Department of Children and Families on Feb. 6, 2009, which indicated a disenrollment date of Feb. 28, 2009.

The petitioner was subsequently approved for ICP Medicaid effective retroactively to Feb. 1, 2009; however, the respondent denied Medicaid payment of the nursing home charges for February 2009 because the petitioner was still enrolled in the LTCDP in the month of February and Medicaid recipients cannot participate in both programs during the same month. Medicaid paid for the petitioner's nursing home charges beginning March 2009 and moving forward. The petitioner's son requested that American Eldercare reconsider retroactively disenrolling the petitioner from the LTCDP effective Feb. 1, 2009 (instead of Feb. 2, 2009), or pay the petitioner's nursing home charges for February 2009. The respondent denied the request because the petitioner's "needs could have been met in a less restrictive environment such as an assisted living facility ... [and] the cut off date for disenrollment was January 31, 2009."

As a result of this determination, the petitioner's son requested a hearing and took the position that the petitioner required 24/7 nursing care. He explained that his mother suffered from dementia; was a fall risk; was incontinent of bowel and bladder; suffered from hypertension, depression, osteoporosis and severe back pain; and that she needed assistance showering, dressing and grooming. The respondent was aware of the petitioner's impairments but determined that an ALF that is staffed and equipped to take care of the petitioner's incontinence, falls, etc., could meet her needs.

The hearing officer determined that the burden of proof was on the agency when an action is taken to terminate benefits received by the recipient. After examining Federal Regulations at 42 C.F.R. §§ 431.206, 431.210, 431.211 and 431.230 for state plan Medicaid, the hearing officer determined that a 10-day advanced notice must be given before the date of action, and if timely appealed, the agency may not terminate or reduce services until a decision is rendered by the hearing officer. The hearing officer noted that American Eldercare is an HMO or managed care organization contracted by the respondent (AHCA) to manage the individual's care under the LTCDP Medicaid Waiver Program and after examining Federal Regulations C.F.R. §§ 438.404, 438.408 and 438.420 concluded that the notice requirements for Medicaid HMOs mirror the state plan Medicaid requirements.

Based on the above authorities, the hearing officer concluded that Medicaid and Medicaid HMOs are both required to give advanced notice before termination of coverage. Additionally, because the original notice of termination issued by AHCA was not presented at the hearing, the hearing officer concluded that the agency did not meet its burden to show that an advanced notice was issued (with notice of hearing rights) prior to American Eldercare's termination of coverage on Feb. 28, 2009. Consequently, the hearing office found that American Eldercare was paid a capitated amount for the petitioner's care for February 2009 and ordered the company to pay the petitioner's nursing home charges for that month.

Diana Coen Zolner *graduated from Touro College, Jacob D. Fuchsburg Law Center in May 2001. After graduating law school, she worked as a prosecutor for the District Attorney, Suffolk County, New York, from 2001 to 2002. She then transitioned to private practice as an associate attorney, practicing in the areas of elder law, wills, trusts and estates from 2002 to 2008. In September 2008, she moved to Florida to enjoy the sunshine and began working as an associate attorney and continued to practice in the areas of wills, trusts and estates. She is currently employed as an associate attorney with Brandon Family Law Center LLC in Brandon, Fla.*

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