The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Inside:

- ***What elder law attorneys need to know about working with non-attorney Medicaid companies***
- ***Will ABLE Act accounts replace special needs trusts? Probably not.***
- ***Court-restricted depositories for guardianships and special needs trusts***

Vol. XXII, No. 2

Fall 2015

www.eldersection.org

The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar

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
"Everglades Morning" by Randy Traynor
www.RandyTraynorphotography.com

9/2015

Contents:

The deadline for the WINTER 2015 EDITION is November 1, 2015. Articles on any topic of interest to the practice of elder law should be submitted via email as an attachment in MS Word format to Stephanie M. Villavicencio at *svillavicencio@zhlaw.net*, or call Arlee Colman at 800/342-8060, ext. 5625, for additional information.

The Elder Law Advocate invites your attention to the correct photograph of Alexander J. Hernandez, Esq., co-author with Alex Cuello, Esq., whose article "Handwriting expert opinions can't make their mark alone" was published in the spring 2015 edition. Please excuse any inconvenience.

The state of the section

Thank you to so many who have contributed so much to the Elder Law Section's success in the past year. Year to date, we have continued to grow financially.

I would like to express the gratitude the section owes to outgoing Chair Jana McConnaughhay. We were fortunate to have Jana in Tallahassee this past legislative session. I know the session placed a burden on her already full schedule, but the ELS is very fortunate to have such a brilliant advocate in the state capital, willing and able to meet with legislators, committees and lobbyists. Jana spent hours in face-to-face meetings and on phone conferences explaining our section's viewpoints to the powers that be. The legislation that came out of this past legislative session was not what we sought, but it was certainly better than what it could have been. If it were not for the selfless contributions of Jana and other members of our section like Twyla Sketchley, Shannon Miller and Victoria Heuler, the guardianship legislation could have been significantly more draconian.

There will be no rest for the weary. The Guardianship Committee, under the leadership of Victoria Heuler and Carolyn Landon, and the Legislative Committee, under the leadership of Scott Selis and William Johnson, were extremely busy during the last legislative session. Their tasks don't appear to be any less intense for the coming session.

It appears that the 2016 Legislative Session is building to be just as significant as the last. We have the understanding that Senator Nancy Detert will be reintroducing guardianship legislation. At least two points that we expect to be addressed in the coming session are the issues of "the wheel" and the establishment of a professional guardian oversight entity. For those of you who do not practice in the area of guardianship, the wheel would address cases where the court is appointing a professional (non-family member) guardian. The wheel proposal is that the guardian should be appointed from a random, rotational list of professional guardians maintained by the clerk's office. The section has been opposed to these types of appointments because we believe that random selection disregards the complexities of a case that might require the skills of a particular guardian. There are also concerns about the ability to vet a proposed guardian prior to his or her appointment.

It is too early to have a clear view of exactly what the professional guardian oversight organization will look like. In the last session, Senator Detert proposed setting up an Office of Public and Professional Guardians (OPPG). Under this previously proposed legislation, the OPPG would essentially have the authority to license and regulate professional guardians. The Legislature may face significant budgetary contraints in establishing this administrative department to oversee guardians statewide. As during the last session, the ELS will be looking for guidance from our legislative lobbyist, Brian Jogerst. Brian has been invaluable in guiding us through the behind-the-scenes workings of the Legislature and in getting our views and opinions in front of the people who can really make a difference and help us to advocate for those who are unable to advocate for themselves.

David Hook

Message from the chair

John Frasier, our UPL committee chair, with the assistance of Robert Sondak, was successful in securing a favorable decision from the Florida Supreme Court on the issue of what specific action constitutes the unlicensed practice of law with regard to Medicaid planning. The issue might not be closed, however. In July, William Burns, a financial planner, petitioned the United States Supreme Court for a writ of certiorari. It is too early to know if the Court will choose to issue such writ. Stay tuned.

The section is sorry to see Angela Warren stepping down from her leadership role of the Exploitation & Abuse Committee. Angela has contributed tireless hours to that committee, and her leadership will be missed. We are very fortunate to have Erika Dine willing to step into the leadership role of this important committee.

I would like to thank the steering committee of this year's Essentials of Elder Law and Annual Update: Collette Small, Jason Waddell, Jill Ginsburg, Padrick Pinkney, Robert Segear and Stephanie Villavicencio. Ellen Morris has put together a great lineup of speakers and topics for next year's three-day event, Jan. 14-16, 2016. The Update will be held once again at the Universal Portofino Resort in Orlando.

This year's retreat will be in New Orleans. I've never been there, and I'm looking forward to visiting the city. Due to the historically low turnout for out-of-state retreats, Sam Boone and I have decided to structure the CLE a little differently this year. This year's CLE will be a facilitator-led open discussion, similar to the sessions we have enjoyed at AFELA's Unprogram and Elder Concert. When in such a small group, it is a great opportunity to learn from each other.

I am looking forward to serving this year as chair of the Elder Law Section. I really appreciate everyone's continued participation. I anticipate we are going to have a great year.

What elder law attorneys need to know about working with non-attorney Medicaid companies

by Leonard E. Mondschein

Now that the U.S. Supreme Court has issued Advisory Opinion No. SC14-211 – "Medicaid Planning Activities by Nonlawyers," what changes should we expect to see from nonlawyers who have been engaged in unlicensed practice of law (UPL) in the past, and what do elder law attorneys working with nonlawyer Medicaid planning companies need to know?

With regard to the changes we expect to see from nonlawyers who have been engaged in UPL in the past, we see several possibilities in the near future. These possibilities can be broken down into three categories: 1) nonlawyer Medicaid planners (NLMP) who cease and desist from engaging in UPL in the future; 2) those who continue to practice law in violation of the Supreme Court's Advisory Opinion; 3) and those who rearrange their activities to appear on the surface no longer to be engaged in UPL. The first two categories are self-explanatory. Clearly those NLMPs who continue to practice law will be subject to cease and desist orders from The Florida Bar as well as to criminal charges by the State Attorney's Office and possibly other enforcement agencies of state government such as the Attorney General's Office and/or the Department of Financial Regulation. Those who are tasked to review these cases and enforce the law will have greater guidance than in the past, with a broader and more detailed explanation of what constitutes UPL regarding Medicaid planning, enumerated in the Supreme Court's Advisory Opinion.

The more challenging cases will come from complaints filed against NLMPs who continue to engage in UPL in less obvious ways. Most cases will involve an attorney working with the NLMP in some capacity. If that attorney is being directed by the NLMP as to strategy and/or implementation, it could still constitute UPL on the part of the NLMP and assisting UPL on the part of the attorney. *See* Advisory Opinion No. SC14-211 and The Florida Bar, Rules of Professional Conduct (RPC) 4-5.4 (d). Questions to be asked would be: Did the client meet independently with the attorney? Did the attorney ask all appropriate questions to understand the case? Did the attorney recommend a course of action, independent of outside influences from the NLMP? Who prepared the legal documents? Who paid the lawyer?

In the author's opinion, the most important indication of whether or not the attorney is himself or herself engaged in assisting UPL with the NLMP is whether or not the attorney was compensated directly from the client and in an appropriate proportion, as compared to the NLMP's compensation. Since the Supreme Court Advisory Opinion limits the NLMP to assisting in filling out a Medicaid application and assisting in the collection of documents, the NLMP's compensation for services should be significantly less than the attorney's fee. If that is not the case, then it would appear that the NLMP is engaged in UPL and the attorney is assisting in UPL. These higher fees paid to the NLMP might also constitute financial exploitation, as the NLMP is charging an excessive fee for filing out a Medicaid application and assisting in the gathering of documents. From an ethics point of view, the attorney may be violating RPC 4-5.4(a), which states, "A law firm shall not share legal fees with a nonlawyer, except … ." There are no exceptions for sharing a legal fee with a company engaged in filing Medicaid applications.

What about an attorney who hires employees of a former Medicaid planning company in an attempt to bill all services as legal fees and then distributes the fees earned by the attorney to non-attorney employees? This type of arrangement should still be in violation of RPC 4-5.4(a), if it can be demonstrated that the employees of the attorney are being compensated in excess of normal secretarial or paralegal rates and/or are not performing appropriate services for the law firm, and the attorney is receiving minimum compensation for his or her services. Furthermore, compensating nonlawyer employees using bonuses may also be an ethical violation, if it is not based solely on "work performed" or "extraordinary efforts on a particular case or over a specified time period." Compensation cannot be based on cases brought in by actions of a nonlawyer or legal fees received. RPC 4-5.4 (a)(4) and Florida Ethics Opinion (EO) 02-1. Also, such an arrangement may also violate RPC 4-5.4(e), which states: "A lawyer shall not practice with or in the form of a business entity authorized to practice law for a profit if: (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer." The commentary stresses that protecting the lawyer's independent judgment is the underpinning of this rule. As with any business arrangement, the specific facts and circumstances of each case must be examined.

If the attorney charges a reasonable fee for his or her services and the NLMP company charges a reasonable fee for its services in assisting in the filing of a Medicaid application, which is recognized under the Supreme Court's Advisory Opinion, there may still be other ethical concerns for the attorney. Those concerns involve communications, confidentiality, duty of loyalty (i.e., who is your client?) and feeder business.

RPC 4-1.4 "Communication" requires the attorney to communicate with the client with regard to issues of informed consent, objectives of the client, keeping the client reasonably informed and complying with reasonable requests of the client. These requirements are impossible to comply with absent direct communication between the attorney, or a member of his or her staff, and the client. If the attorney is being directed by the NLMP, who is communicating with the client directly, the attorney may be in violation of this rule.

An attorney who works with an NLMP needs to be careful not to violate RPC 4-1.6 "Confidentiality of Information" when interacting with the NLMP. Since the NLMP may only collect information for the purpose of filling out a Medicaid application and not to develop a Medicaid strategy or to prepare legal documents, the attorney needs to be mindful of breach of confidentiality by disclosing private and potentially sensitive information to the NLMP. Even if the client consents to disclosing certain information to the NLMP, it may destroy attorney/client confidentiality so as to allow such information to be discoverable for purposes of litigation in the future.

When an NLMP company refers all or most of its Medicaid application clients to the same attorney for Medicaid planning services, the potential for a "Conflict of Interest" under RPC 4-1.7 exists. The commentary under this rule states that "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." When the attorney is receiving substantial income from an NLMP, it is arguable that the attorney's loyalty is to the NLMP and not to the client who has been referred. If the NLMP instructs the attorney to execute a Medicaid plan in a particular way, it may be difficult for the attorney to go against the instructions of the NLMP, thereby failing to exercise independent judgment. While the rule allows for "Informed Consent" to such representation, it should not apply in this case since RPC 4-1.7 (b)(2) states: "Notwithstanding the existence of a conflict of interest under subsection (a), a lawyer may represent a client if: (2) the representation is not prohibited by law." Since Advisory Opinion No. SC14-211 clearly states that a nonlawyer "rendering legal advice regarding the implementation of Florida law to obtain Medicaid benefits" constitutes the unlicensed practice of law, an attorney who follows the advice of an NLMP not only fails to exercise independent judgment, and thus has a conflict of interest under RPC 4-1.7, but is also engaged in assisting UPL under Advisory Opinion No. SC14-211.

In conclusion, we can expect to see some former Medicaid planning companies discontinue their past activities that constitute the practice of law while others continue to engage in UPL, either overtly or surreptitiously. This third possibility will most certainly involve attorneys who may not be aware of the ethical as well as the criminal activities in which they may be engaged, as UPL is a third degree felony. Since the Supreme Court's Advisory Opinion No. SC14-211 explains in detail when nonlawyers are engaged in UPL, it will be easier going forward to prove these cases. Elder law attorneys are advised to take caution when working with non-attorney Medicaid planning companies.

***Leonard E. Mondschein, J.D., LL.M., CELA, CAP,** is a shareholder in The Elder Law Center of Mondschein and Mondschein PA with offices in Miami and Aventura. He is board certified by The Florida Bar in elder law and wills, trusts and estates and has served as chair of the Elder Law Section. He is a Certified Elder Law Attorney (CELA) by the National Elder Law Foundation and is a member of the Council of Advanced Practitioners (CAP). He serves on the NAELA board of directors.*

Will ABLE Act accounts replace special needs trusts? Probably not.

by Kristina Hernandez-Tilson

Elder law attorneys, especially those who draft special needs trusts to protect people with disabilities from losing government benefits, may be familiar with the ABLE (Achieving a Better Life Experience) Act of 2014, the first sweeping legislation for people with disabilities since the Americans with Disabilities Act was passed in 1990. The ABLE Act's passage culminated an eight-year campaign to gain approval for tax-free savings accounts to help individuals and families of people with disabilities pay for disability-related expenses.

The ABLE Act is modeled after the 529 education savings plans that help families save for college. The ABLE Act permits people with disabilities and their families to set up special savings accounts for expenses such as education, housing, transportation, personal support services, health care, etc. Earnings on an ABLE Act account will not be taxed, and account funds generally will not be considered when assessing eligibility for supplemental security income (SSI), Medicaid or other federal means-tested benefits, so long as they remain under $100,000. This is in contrast to the current limit of $2,000, which is the maximum savings an individual with disabilities is allowed to have while maintaining his or her federal means-tested benefits.

The media attention around passage of the ABLE Act created a sense of hope in the disability community that perhaps this legislation could provide a meaningful alternative to special needs trusts. There are certain provisions, however, both in the Act itself and in the first set of regulations promulgated by the IRS, that call into question this possibility. The ABLE Act will likely provide a valuable tool for families of persons with disabilities, but it does not seem likely that it will replace the need for special needs trusts, especially where significant assets are involved.

Like 529 plans, each state will determine the aggregate amount that, over time, can be contributed to an ABLE Act account. According to the ABLE Act itself, however, regardless of the state, each individual is allowed to contribute only up to the annual gift exclusion for that year. For 2015 this is $14,000. Another limitation to the usefulness of the ABLE Act is the requirement that the person with disabilities must apply for the account before age 26 or provide documentation that the disability had an onset before age 26.

In June 2015, the IRS issued its first proposed regulations, providing initial guidance on how the new accounts should function and what types of expenses they should cover. The proposed regulations indicate the IRS has taken a liberal view in determining what counts as "qualified disability expenses" under the new law. Specifically, the proposal states that "'qualified disability expenses' should be broadly construed to permit the inclusion of basic living expenses and should not be limited to expenses for items for which there is a medical necessity or which provide no benefits to others in addition to the benefit to the eligible individual." In other words, the expenses must merely provide a quality of life benefit for the person with disabilities rather than be of medical merit. Other provisions within the proposal are stricter. For example, the reporting and oversight requirements go beyond those governing 529 plans. This could make ABLE Act savings accounts considerably burdensome and costly to administer or utilize.

The proposed rules will be open for public comment for 90 days (until mid-September) before the IRS issues final regulations. The ABLE Act has been enacted in 22 states, including Florida, which must now promulgate its own set of state-specific regulations to help implement the new law.

Kristina Hernandez-Tilson *is an associate with Langer Law PA. She received her law degree from The Catholic University of America, Columbus School of Law. She received the BA from the University of Notre Dame. She represents clients in matters related to trusts and estates, as well as special needs, including litigation. She is licensed to practice in Florida and the Southern District of Florida.*

Court-restricted depositories for guardianships and special needs trusts

As court-restricted depositories have been considered *de rigueur* for many years in Southeast Florida, more and more other jurisdictions in Florida are choosing them to protect wards' assets. The cost of bonds and the misuse of wards' assets have prompted more courts around the state to utilize this method of protection.

Who can qualify to be a restricted depository in Florida? Under Florida law, banks, savings and loans and trust companies can, as described in F.S. 69.031, and broker dealers can as well, as described in F.S. 517.021(6)(a). (Please review those sections.)

Prior to hiring a financial institution for the first time, be sure to speak with an officer of the firm before petitioning the court. Some will accept the responsibility while others will not, oftentimes because they want to avoid liability in case assets are somehow removed without a court order.

When approaching a prospective depository, you might consider preparing a list of questions as to how it administrates accounts:

- What does it need to get an account opened?
- Does the guardian (trustee) need to appear in person at the firm to open accounts?
- How does the firm process such expenses as court orders for attorney fees, taxes, court filing costs and monthly expenses for the care of the ward?
- Is there a separate legal department that reviews each court order, and what is the turnaround time for review and distribution?
- Does the institution have the ability and the willingness to help the guardian (trustee) in investments pursuant to F.S. 518.11, also known as the Prudent Investor Rule? If so, what are the costs for investment services?
- What assistance will the financial institution be able to give to the fiduciary and the attorney in marshaling the ward's assets?

Cash accounts from other banks are usually best collected by the guardian (trustee) or attorney, although there are times when the depository will need to send demand letters to financial institutions that are not cooperating. Securities are best transferred by the depository from other brokerage institutions via the automated customer account transfer service (ACATS). Here are important questions to ask:

- What, if any, are the institution's fees for statements, checks, distributions/transfers, etc.?
- Will the company provide duplicate copies of the statements to the attorney of record so that the annual accounting can be properly filed?

Information and paperwork that are generally needed by the restricted depository when opening an account include, but are not limited to: certification by depository, letters of guardianship, order designating depository, receipt of assets and contact information of the fiduciary. If the depository is for a special needs trust, a copy of the trust agreement should be provided. In the case of IRAs and accounts with designated beneficiaries, the names and dates of birth of the beneficiaries and the percentage of distribution should be provided.

It is suggested that you send a copy of the order designating depository to the prospective financial institution prior to submitting it to the court. There may be directions in the document that the institution is unable to fulfill. It is better to clear those details prior to having the order signed.

As they say, "the devil is in the details." Each firm will have different policies and procedures. So, look before you leap when naming a firm as the restricted depository. Do your homework to find the right financial partner, and perhaps most important, seek assistance and guidance from prospective partners early in the process to establish a personal relationship and to find the right fit.

For more information about court-restricted depositories for guardianships and special needs trusts, contact Comerica Guardian Angels:

Blake Smith - Contributor
Financial Consultant – Comerica Guardian Angels, Comerica Securities, Inc.
561/961-6680
wbsmith@comerica.com

Keith Seago - Contributor
Financial Consultant – Comerica Guardian Angels, Comerica Securities, Inc.
561/961-6696
wkseago@comerica.com

continued, next page

Court-restricted depositories
from preceding page

Advisors. Registrations do not imply a certain level of skill or training.

Securities and other non-deposit investment products offered through Comerica are not insured by the FDIC; are not deposits or other obligations of, or guaranteed by, Comerica Bank or any of its affiliates; and are subject to investment risks, including possible loss of the principal invested. Past performance is not indicative of future results. Information presented is for general information only and is subject to change.

Comerica Bank and its affiliates do not provide tax or legal advice. Please consult with your tax and legal advisors regarding your specific situation.

Information shared and included in this article was prepared by Comerica Securities, Inc. The views expressed within this article are subject to change without notice.

Attorneys asked to urge clients to utilize AHCA complaint button

by Al Rothstein

The Florida Joint Public Policy Task Force for the Elderly and Disabled wants to see greater utilization of the Agency for Health Care Administration's (AHCA) complaint button.

One issue the task force is concerned about is that seniors on Medicaid may be signing forms allowing their Medicaid Managed Care Plans (MCPs) to take control over who receives information from the state, including notices for annual deadlines for ongoing eligibility, without understanding what they are signing. This has led to an MCP missing the deadline for at least one client.

"A wife was understandably very upset when she found out her husband's Medicaid had been cancelled," says Emma Hemness, president of the Academy of Florida Elder Law Attorneys (AFELA), task force member and elder law attorney in Brandon. "The MCPs are supposed to make sure this doesn't happen."

The wife says she never received a notice, and she doesn't remember giving any authority to the MCP.

"She only found out about the cancellation from the facility. She then came to me to reapply and had to start from the beginning, adding unnecessary stress and expense for her," Hemness adds.

When attempting to resolve issues like this, "MMOs have been very difficult to reach for solutions," says Jill Burzynski, an AFELA board member, task force member and elder law attorney in Naples.

This means that clients and their attorneys must sometimes initiate complaints. This can be done by utilizing the complaint button on AHCA's website (http://ahca.myflorida.com/Medicaid/statewide_mc/index.shtml).

In fact, the complaint button is recommended for any difficulties that your clients may be experiencing with Florida's Medicaid managed care. It is imperative to let your clients know that they must document their complaint or that you can do it for them.

"Complaints are the only way we can track system failures and achieve resolutions," says Hemness. "We urge all attorneys and their clients not to hesitate to submit a complaint."

AHCA monitors the complaints, and members of the task force are in communication with AHCA representatives to learn about the nature of the complaints and to seek proper resolutions.

An example, not related to accessing client records, that we pointed out in a previous newsletter to task force contributors illustrates that the complaint button produces results:

A daughter, whose mother resided in the same ALF on Diversion for some time before managed care implementation, was told that her mother's ALF contract co-pay was increasing by $200 due to a shortfall in the managed care organization's payment. Neither the mother nor the family had the means to pay the additional $2,400 per year. The daughter contacted the Foundation for LTC Solutions' Facebook page for an answer, and was instructed to immediately utilize the complaint button.

Here's the response on the Facebook page:

Daughter: "I did as advised. Within ten minutes I received a call from ACHA. They requested more info. Then two hours later I got a call from them. ACHA is telling me part of the contract between ALF and the new provider is that ALF cannot charge me the difference that is lost from the previous contract. They are going to contact ALF and get back to me."

The task force works daily on behalf of Florida's most vulnerable citizens and their families, as well as for the practice of elder law, through advocacy, action and education. It is a combined effort of the Academy of Florida Elder Law Attorneys and The Florida Bar's Elder Law Section.

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

Saving a trust from technically imperfect execution

by Kristina Hernandez-Tilson

As the old saying goes, the devil is in the details. It is not unheard of for an otherwise well written trust (or trust amendment) to contain errors in its execution, the likes of which threaten the enforceability of the document. This is precisely what occurred in the case of *Zuckerman v. Alter*, 615 So. 2d 661 (Fla. 1993). In *Zuckerman*, the deceased was the sole grantor of her living trust that became irrevocable upon her death. According to its provisions, the bulk of her estate (which consisted of a brokerage account titled in the name of the trust) was left to her nephew. Her nieces did not inherit under the trust, but were named as the beneficiaries of her residuary estate in her will. Ordinarily, provisions in a trust that purport to transfer property upon the death of the grantor are considered testamentary in nature, and as such must comply with the execution formalities of a will.[1] One such formality is the requirement that it be signed by two witnesses.[2]

In *Zuckerman*, the grantor's nieces challenged the validity of the document on grounds that it failed to comply with the execution formalities of a will, specifically that it was witnessed by only one person (the notary) rather than two, as the statute requires. The trial court entered summary judgment in favor of the petitioner nieces. This ruling was reversed and remanded by the District Court of Appeal. On review, the Florida Supreme Court held that the trust was not testamentary and thus did not need to comply with will execution formalities. Thus, the Supreme Court affirmed the District Court of Appeal's judgment and upheld the validity of the trust.

This outcome relied in particular on Florida Statutes § 689.075(1)(g):

> (1) A trust which is otherwise valid, including, but not limited to, a trust the principal of which is composed of real property, intangible personal property, tangible personal property, the possible expectancy of receiving as a named beneficiary death benefits as described in s. 733.808, or any combination thereof, and which has been created by a written instrument shall not be held invalid or an attempted testamentary disposition for any one or more of the following reasons:
>
> (g) Because the settlor is, at the time of the execution of the instrument, or thereafter becomes, sole trustee; *provided that at the time the trust instrument is executed it is either valid under the laws of the jurisdiction in which it is executed or it is executed in accordance with the formalities for the execution of wills required in such jurisdiction*. (Emphasis added).

In *Zuckerman*, the Florida Supreme Court found that the trust was valid because it complied with the formalities of F.S. § 689.075(1)(g), which the Court held creates two alternative tests, not a single test, to determine the validity of an inter vivos trust of which the settlor is the sole trustee. According to the majority, the trust satisfied the elements of one of the two tests, thus validating the trust.

Furthermore, the Court held that the trust was "not a testamentary 'will substitute' that requires compliance with the formalities for the execution of wills." It reasoned that "[i]f by the terms of the trust an interest passes to the beneficiary during the life of the settlor, although that interest does not take effect in enjoyment or possession before the death of the settlor, the trust is not testamentary." Essentially, the Court found that during the settlor's life, the trust created a contingent equitable interest for the nephew in the remainder of the property and that this was enough to render the trust non-testamentary in nature, and therefore it need not comply with will execution formalities.

The usefulness of this ruling is limited in that it applies only to trusts (or trust amendments) drafted after 1971 (the year F.S. § 689.075(1)(g) was enacted) and only to personal property held in trust, not real property. Nonetheless, in cases where these two conditions are met, *Zuckerman* may save the enforceability of the trust.

The Florida Legislature has enacted other statutes in an attempt to save technically imperfect testamentary documents. For example, in 2011, Florida adopted § 732.615. This statute is better suited for testamentary documents that require reformation of their substantive provisions, not to cure defects in execution. Were Florida to adopt the Uniform Probate Code's § 2-503, also known as the "harmless error rule," this would help resolve a broad range of errors in the execution of testamentary documents, regardless of whether the property were real or personal.

***Kristina Hernandez-Tilson** is an associate with Langer Law PA. She received her law degree from The Catholic University of America, Columbus School of Law. She received the BA from the University of Notre Dame. She represents clients in matters related to trusts and estates, as well as special needs, including litigation. She is licensed to practice in Florida and the Southern District of Florida.*

Endnotes

1 "For trusts created by residents of the State of Florida, the law requires that any testamentary aspects of a trust be executed with the formalities required for the execution of a will." Florida Statutes § 736.0403(2)(b).

2 "[M]ust be in the presence of at least two attesting witnesses." Florida Statutes § 732.502 (b) (2) (b).

Elder Law Section helps bring Elder$mart$ to Florida

by Twyla Sketchley, BCS

Elder$mart$ is a financial literacy program designed for our aging population that provides an overview of various issues important to this demographic. Elder$mart$, originally created under the name "ElderCARE," was developed with the support of the National Conference of Bankruptcy Judges, through its Public Outreach Committee. Judge Tracey Wise of the Eastern District of Kentucky gathered a panel of professors, social workers and attorneys to put together this overview program, designed to be presented in segments addressing budgeting, financial awareness and investing, housing fraud (reverse mortgages and home improvement scams), credit, credit abuse and financial scams. The program is divided into four segments, and each segment includes materials to be provided to the participants, as well as presenter guides for the presenting volunteers.

Bankruptcy judges have been committed to financial literacy for a very long time. The original CARE program, which focuses on high school and college students, was created by a bankruptcy judge in Buffalo, New York—John Ninfo (now retired)—who was horrified by the number of young people appearing in his court. Judge Ninfo came to the realization that these young people didn't understand anything about credit or credit cards, budgeting or investing. Judge Ninfo reached out to other bankruptcy judges and insolvency professionals around the country, and by the time Judge Ninfo retired, there were CARE projects in all 50 states. CARE continues, and you can access those materials at *www.care4yourfuture.org*.

The Public Outreach Committee of the NCBJ realized that many of our aging population could also benefit from outreach about credit and budgeting and, moreover, were being victimized through home and other scams and identity theft. It was from this continuing desire to educate and keep individuals out of bankruptcy court that ElderCARE (now Elder$mart$) was created.

Bankruptcy Judge Laurel Isicoff, immediate past chair of the Public Outreach Committee of the National Conference of Bankruptcy Judges, who sits in the Southern District of Florida, contacted the Elder Law Section about bringing this project to Florida. The ELS is committed to providing speakers and to searching out venues to bring this important information to our clients and our community members. Materials for audiences and speakers are ready for dissemination, as are detailed PowerPoint presentations.

The Elder Law Section is reaching out to senior centers and community groups to move the program forward. The goal is to find willing speakers in each of the bankruptcy circuits who can represent the ELS in this good work. If you are interested in participating in this valuable program, please contact Immediate Past Chair Jana McConnaughhay at *jana@mclawgroup.com*.

THE FACTS

Bankruptcy, credit card debt and financial abuse are growing issues for older adults. The Institute for Financial Literacy reported that those 65 and older accounted for 9.12 percent and those 55 to 64 accounted for 18.12 percent of debtors polled in the 2010 Annual Consumer Bankruptcy Demographics Report.[1] The Institute for Financial Literacy states that over the past five years there has been an increase of 25 percent of bankruptcy debtors 55 and older.[2] A study conducted by AARP showed that families headed by someone 75 or older increased credit card debt by 2.9 percent while families in all other age brackets decreased their credit card debt by more than 5 percent.

According to The MetLife Study of Elder Financial Abuse from June 2011, the estimated annual loss by victims of elder financial abuse in 2010 was at least $2.9 billion.[3] Those 50 and older accounted for 49 percent of fraud complaints to the Consumer Sentinel Network from Jan. 1 to Dec. 31, 2014.[4] In Florida alone there were 37,059 identity theft complaints reported to the Federal Trade Commission.[5]

Endnotes

1 Lindfield, Leslie E., Esq. *2010 Annual Consumer Bankruptcy Demographics Report: A Five Year Perspective of the American Debtor*. Rep. South Portland, ME: Institute for Financial Literacy, 2011. Print.

2 *Ibid.*

3 *The MetLife Study of Elder Financial Abuse. MetLife Mature Market Institute*. MetLife Mature Market Institute, June 2011. Web.

4 United States. Federal Trade Commission. *Consumer Sentinel Network Data Book for January - December 2014*. Washington, D.C.: Federal Trade Commission, 2015. Print.

5 *Ibid.*

The Florida Bar Practice Resource Institute

PRI

Promoting Excellence in the Profession

CAREER CENTER

Searching for a job or looking to fill a position?

With easy to use search tools, The Florida Bar Career Center is the #1 source for job seekers to find opportunities to help advance their careers. Employers will also find that the Career Center provides the resources needed to make recruitment more efficient and successful.

Visit The Florida Bar Career Center today!

job seeker

Advance Your Career
It's fast, easy and free! Register today and explore the opportunities that will take your career to the next level.

Post Your Resume Anonymously
Simply post your resume or create an anonymous career profile and employers will contact you directly with new opportunities.

Search Through Premier Job Postings
Search the many jobs in your field that are not widely available on other career sites.

Receive Job Alerts
Create job alerts based on various criteria and new opportunities will be emailed directly to you.

employer

Hire Qualified Job Seekers
Reach qualified candidates who have the experience and expertise to fill your positions.

Save Time and Money
Single out candidates who specialize in your field and advertise positions to them at a fraction of what it costs on other job boards.

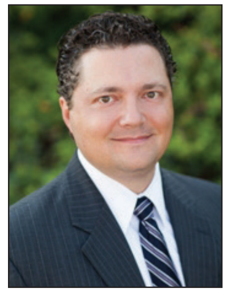
Post Multiple Positions
From one posting package to unlimited access, there are many options available to assist you in your recruitment.

Receive Resume Alerts
Create resume alerts based on various criteria and you will be notified of qualified candidates directly via email.

For more information, visit us online at www.floridabar.org/PRI

Meet your Elder Law Section
2015 - 2016 officers

David Hook, Chair
The Hook Law Group
New Port Richey
727/842-1001
dhookesq@elderlawcenter.com



Steven E. Hitchcock, Secretary
Special Needs Lawyers PA
Clearwater
727/443-7898
steve@specialneedslawyers.com

Ellen S. Morris, Chair-Elect
Elder Law Associates PA
Boca Raton
561/750-3850
emorris@elderlawassociates.com

Jason A. Waddell, Treasurer
Waddell & Waddell PA
Pensacola
850/434-8500
jason@ourfamilyattorney.com

Collett P. Small,
Substantive Vice Chair
Law Offices of Collett P. Small
Pembroke Pines
csmall@small-collinslaw.com

Jana McConnaughhay,
Immediate Past Chair
Waldoch & McConnaughhay PA
850/385-1246
jana@mclawgroup.com

Randy Bryan,
Administrative Vice Chair
Hoyt & Bryan LLC
Oviedo
407/977-8080
randy@hoytbryan.com

SAVE THE DATE

ELDER LAW IN NEW ORLEANS!

October 15-17, 2015

Royal Sonesta – New Orleans

300 Bourbon Street - New Orleans, LA 70130

Schedule

Thursday, October 15	6-7:30 p.m.	Executive Council Meeting
Friday, October 16	9 a.m.-12 noon	Substantive CLE - Advanced
Friday, October 16	7-10 p.m.	Dine Around
Saturday, October 17	9 a.m.-12 noon	CLE - Ethics

Book by calling our reservations line at 1-800-SONETA and asking for the Group Code "1014FLORID" or the Group Name "The Bar Elder Law Section" at the Royal Sonesta Hotel New Orleans.

REGISTRATION

Elder Law Section Retreat

New Orleans • October 15-17, 2015

Schedule

Thursday, October 15	6-7:30 p.m.	Executive Council Meeting
Friday, October 16	9 a.m.-12 noon	Substantive CLE - Advanced
Friday, October 16	7-10 p.m.	Dine Around
Saturday, October 17	9 a.m.-12 noon	CLE - Ethics

Registration Fee (Check One)

____ Member of the Elder Law Section $350 (Item Number: ______)

____ Non-Member $400 (Item Number: ______)

METHOD OF PAYMENT (CHECK ONE):

_____Check enclosed made payable to The Florida Bar – OR

___Credit Card: ___ Master Card __Visa ___AMEX __Discover

Name on Card:____

Card No.: ____

Billing ZIP: _____________ Exp. Date:_________________________

Signature:____

Please return this completed form to:

Fax: 850/561-9413
Mail: The Florida Bar Elder Law Section, 651 E. Jefferson Street, Tallahassee, FL 32399
Email: *registrations@flabar.org*

Remit statement with payment. *Thank you!*

SECTION NEWS

Mark your calendar!

Elder Law Section
2015 - 2016 Calendar

October 16-18, 2015
Elder Law Section Retreat – Royal Sonesta, New Orleans, La.

January 14, 2016
Essentials of Elder Law – Loews Portofino, Orlando, Fla.

January 14, 2016
ELS Executive Council meeting – Loews Portofino, Orlando, Fla.

January 15-16, 2016
Elder Law Section Annual Update – Loews Portofino, Orlando, Fla.

January 21-23, 2016
The Florida Bar Winter Meeting, Hilton Orlando, Lake Buena Vista, Fla.

June 15-18, 2016
The Florida Bar Annual Meeting, Hilton Bonnet Creek, Orlando, Fla.

June 17, 2016
ELS Committee Training - 9:00 – 11:00 a.m., Hilton Bonnet Creek, Orlando, Fla.

June 17, 2016
ELS Executive Council Award Luncheon - 12:00 – 2:00 p.m., Hilton Bonnet Creek, Orlando, Fla.

June 17, 2016
ELS Executive Council Meeting - 2:00 – 4:00 p.m., Hilton Bonnet Creek, Orlando, Fla.

SECTION NEWS

AFELA awards scholarships for elder law advocates to attend seminar about fighting elder abuse

by Al Rothstein

Florida's elderly and adults with disabilities are the beneficiaries of an educational opportunity created for their advocates.

The Academy of Florida Elder Law Attorneys (AFELA) took a step toward cutting down on the abuse of our most vulnerable citizens by granting scholarships to two legal services attorneys, allowing them to attend the seminar The Complexity of Elder Exploitation: Addressing the Challenge. The event was sponsored by the Florida Attorney General's Office and The Florida Bar Elder Law Section's Exploitation and Abuse Committee. It was held May 4-6, 2015, in Altamonte Springs. The seminar provided information on how to recognize, investigate and develop a plan to fight exploitation, including utilizing community resources.

May is celebrated each year as Elder Law Month in Florida, which recognizes efforts like this to educate professionals, public servants and the public about the challenges our elderly citizens face. This also comes after Florida's Legislature passed a law in 2014 strengthening the law against elder exploitation, a law in which AFELA and the Elder Law Section played a pivotal role.

"The law now gives us the ability to take real action to cut down on abuse and neglect," says AFELA President Emma Hemness, an elder law attorney in Brandon. "The scholarships are a natural progression, and we feel an obligation to contribute."

The two attorneys who benefitted from the scholarship are from Community Legal Services in Mid-Florida and Florida Rural Legal Services. This is significant because Florida's legal services funds are tight, making it difficult for these elder law advocates to attend valuable educational events such as this one.

"Attending this seminar allowed our firm to better educate our clients with ways to minimize the risk of elder exploitation and assist them with the various legal needs they face during these challenging times," says Valencia Y. Stubbs, Esq., the scholarship winner from Florida Rural Legal Services in Fort Pierce.

"This scholarship was critical for my attendance due to the decreased funding," says Lizzie Johnson, Esq., staff attorney of Community Legal Services of Mid-Florida, the other recipient of the scholarship.

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

Judicial performance feedback sought from Bar members

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

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

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

MEMBER NEWS

Joseph Karp Law Firm

Joseph Karp named to "Super Lawyer" list

Attorney Joseph S. Karp has again been named to the Thomson Reuters list of Florida "Super Lawyers." No more than 5 percent of Florida attorneys receive this honor each year. Recognition as a Super Lawyer is based on two main factors: stellar peer reviews and professional competence. Mr. Karp is the founder and principal of The Karp Law Firm, a South Florida law firm focusing on estate planning, elder law and estate administration. The firm has offices in Boynton Beach, Palm Beach Gardens and Port St. Lucie.

Welcomes two attorneys

The Karp Law Firm PA is pleased to announce that attorneys Thornton "Brad" Henry and Chad L. Steskal have joined the firm.

Brad Henry focuses his practice in the areas of estate planning, tax planning and probate and trust administration. He is a graduate of the University of Florida Levin College of Law.

Chad Steskal holds the LL.M. in taxation from the University of Miami School of Law and concentrates his practice in the areas of estate planning, formation of corporate entities, business succession planning, tax planning and asset protection planning.

SECTION SCENE

The Florida Bar Annual Convention
June 24-27, 2015
Boca Raton Resort & Club

David Hook and Collett Small

Shannon Miller (AFELA immediate past president), Brian Jogerst (AFELA lobbyist), Rep. Kathleen Passidomo (Elder Law Section's 2015 Legislator of the Year), Jana McConnaughhay (ELS chair) and Twyla Sketchley (ELS past chair)

Travis Finchum, Steve Hitchcock and Stephanie Edwards

Jana McConnaughhay and Carolyn Landon, the Elder Law Section's 2015 Member of the Year

Section Scene

Jana McConnaughhay and Herschel Minnis, the 2015 Charlotte Brayer Public Service Award recipient

Jana McConnaughhay passes the gavel to incoming ELS President David Hook.

Randy Bryan, Herschel Minnis and Emma Hemness (AFELA president)

David Lillesand and Charlie Robinson

Matt Rheingans and Randy Bryan

Photos courtesy of Twyla Sketchley

Practice Management

Five tips to help you get paid

by Twyla Sketchley

One complaint from lawyers is that they cannot get clients to pay them or cannot get clients to pay them enough. For most of us, getting paid is one of the hardest parts of our practice because collecting payments makes us uncomfortable. For lawyers or firms struggling to be paid—or to be paid what they are worth—it may take only a few simple adjustments to increase the likelihood of payment or to increase the amount. If you are one of those lawyers looking for a better way to collect fees, here are five changes you can make in your practice to help you get paid:

1. Operate like you are in business to practice law

Unless you are working for a nonprofit legal services organization chartered to provide free legal services to clients and are being supported by donations (or you are independently wealthy and practicing law as a hobby), *you have to get paid*. This does not mean you cannot provide pro bono legal services. However, it does mean you have to be paid fair market value for your paid services; otherwise, you cannot pay your staff, your insurance, your utilities or yourself. As a business, you should have a business plan and a cash flow statement, and you should know how much money you need to make each month to meet your overhead obligations (including your salary). This will help you adjust your rates, your billing practices and your collection practices to ensure you meet your overhead each month.

2. Increase your retainers and make them "evergreen"

Many attorneys find collection an issue once the initial retainer runs out. To prevent this, increase the size of your retainer and provide a mechanism in your retainer agreement that allows your firm to seek additional funds to replenish a retainer if the original runs low or is exhausted. The size of your retainer should be large enough to pay fees and costs to reach the first milestone in a case. For instance, in a guardianship, if you represent the petitioner, your retainer should be large enough to pay your fees and costs through the hearing on incapacity and appointment of a guardian. Your retainer agreement should include a provision allowing you to request additional money to replenish that retainer as you bill against it, often called an "evergreen" retainer. There are examples of evergreen retainer provisions in most practice management form books or form programs.

3. Be sure flat fees cover time and costs of the entire representation

Many elder law attorneys charge flat fees for estate planning, simple guardianships and long-term care cost planning. This flat fee may not be enough, however, to cover the actual time and costs spent on a matter. Even worse, the firm may be doing additional work unrelated to the particular representation and not charging additional fees because the firm fails to track what the firm is actually doing for the client. If you are charging a flat fee, be sure it is high enough to cover your fees and costs for the particular task you have been retained to complete. And be sure your firm is not doing additional work not be covered by the flat fee or the representation agreement. For example, you charge a flat fee for developing a long-term care cost plan that might take your firm 10 hours to complete, and your client asks you to resolve a potential discharge issue with an assisted living facility that takes another five hours to resolve. If you work on the discharge issue for no additional fee, you have reduced your fees by one-half and have taken five hours away from other billable cases. (You may also have created a risk management issue by providing services not specified in your representation agreement.)

4. Stop working if you are not being paid

Watch your accounts receivable and when a client stops paying, stop working. Immediately notify the client (in writing) that the bill is past due and that no further work will be done in the matter until the balance is paid. If you are involved in litigation, you may need to ensure the client's position is protected pursuant to the Rules Regulating The Florida Bar. It is rare, however, that you cannot temporarily stop work until payment is made. And it is rare that an attorney will be required to stay in a case without payment. In the event the client does

continued, page 25

Committees keep you current on practice issues

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

SUBSTANTIVE COMMITTEES

ETHICS
Steven E. Hitchcock, Clearwater
727/443-7898
steve@specialneedslawyers.com

EXPLOITATION & ABUSE
Amy Mason Collins, Tallahassee
850/385-1246
amy@mclawgroup.com

Erica Dine, Bradenton
941/746-3900
erika@dinelaw.com

GUARDIANSHIP
Carolyn Landon, West Palm Beach
561/588-1212
carolyn@landonlaw.net

Victoria Heuler, Tallahassee
850/421-2400
victoria@hwelderlaw.com

LEGISLATIVE
Scott A. Selis, Palm Coast
386/445-8900, ext. 22
sselis@palmcoastlaw.com

William Johnson, Melbourne
321/253-1667
wjohnson@floridaelderlaw.net

MEDICAID & GOVERNMENT BENEFITS
Amanda Wolf, Tampa
813/350-7991
amanda@wolfelderlaw.com

Heather Kirson, Orlando
407/422-3017
hkirson@kirsonfuller.com

SPECIAL NEEDS TRUST
Sponsored by Family Network on Disabilities

Travis D. Finchum, Clearwater
727/443-7898
travis@specialneedslawyers.com

VETERANS' BENEFITS
John Clardy, Crystal River
352/795-2946
jsclaptop@tampabay.rr.com

SUBSTANTIVE SPECIAL COMMITTEES

FINANCIAL PRODUCTS
Jill J. Burzynski, Naples
239/434-8557
jjb@burzynskilaw.com

Marjorie Wolasky, Miami
305/670-7005
mwolasky@wolasky.com

MENTORING
Beth Waddell, Clermont
352/272-7167
beth@waddellelderlaw.com

PROBATE & ESTATE PLANNING
A. Stephen Kotler, Naples
239/325-2333
skotler@kotlerpl.com

Mike E. Jorgensen, Jacksonville
904/619-8890
mjorgensen@seniorcounsellaw.com

UNLICENSED PRACTICE OF LAW
John R. Frazier, Largo
727/586-3306, ext. 104
john@attypip.com

ADMINISTRATIVE COMMITTEES

CLE
Sam Boone, Gainesville
352/374-8308
sboone@boonelaw.com

COUNCIL OF SECTIONS
Rotating between section chair and chair-elect

PUBLICATIONS
Stephanie M. Villavicencio, Miami
305/285-0285
svillavicencio@zhlaw.net

Susan Trainor, Tallahassee
850/878-7760
editor.trainor@gmail.com

ADMINISTRATIVE SPECIAL COMMITTEES

CERTIFICATION
Travis D. Finchum, Clearwater
727/443-7898
travis@specialneedslawyers.com

LAW SCHOOL LIAISONS
Alex Cuello, Miami
305/669-1078
acc40@bellsouth.net

Enrique Zamora, Coconut Grove
305/285-0285
ezamora@zhlaw.net

MEMBERSHIP
Robert Morgan, Jacksonville
904/854-0410
rmorgan@robertmorganlaw.com

Donna McMillan, Stuart
772/286-1700
drm@mccarthysummers.com

SPONSORSHIP
Jason Waddell, Pensacola
850/434-8500
jason@ourfamilyattorney.com

WEBSITE/TECHNOLOGY
Jeffrey William Van Treese II, Boca Raton
561/789-6866
jrt2law@gmail.com

LIAISONS

AFELA
Shannon Miller, Gainesville
352/379-1900
shannon@millerelderlawfirm.com

BOG
Sandra Diamond, Seminole
727/398-3600
sdiamond@wdclaw.com

FICPA
Open

FSGA
David Hook, New Port Richey
727/842-1001
courtservice@elderlawcenter.com

RPPTL
Charlie Robinson, Clearwater
727/441-4516
charlier@charlie-robinson.com

Marjorie Wolasky, Miami
305/670-7005
mwolasky@wolasky.com

NAELA
Howard Krooks, Boca Raton
561/750-3850
hkrooks@elderlawassociates.com

TASK FORCE
Ellen Morris, Boca Raton
561/750-3850
emorris@elderlawassociates.com

YLD
Open

Guardianship Committee Carolyn Landon and Victoria Heuler, co-chairs

The Florida Legislature passed and Governor Rick Scott signed House Bill 5 regarding guardianship proceedings. The new law became effective on July 1. A few of the most significant changes that will affect our guardianship practices are:

The termination or suspension of power of attorney or agent's authority under s. 709.2109(3) is drastically different. If the agent named in the power of attorney is the principal's parent, spouse, child or grandchild, the authority under the power of attorney is not suspended unless a verified motion in accordance with s. 744.3203 is also filed. Carefully read s. 744.3203 for the grounds under which a petitioner may file such a motion and the requirements of the motion.

A change to s.744.3031(2) requires that notice must be served on the alleged incapacitated person (AIP) and on the AIP's attorney at least 24 hours before the hearing on the petition for an emergency temporary guardianship, unless the petitioner demonstrates that substantial harm to the AIP would occur if 24-hour notice is given.

Considerations in appointment of a guardian under s.744.312(a) put the standby or preneed guardian at the top of the list. Review this statute for new court requirements when a professional guardian is appointed.

The timing for filing an annual guardianship plan under 744.367 is now at least 60 days, but no more than 90 days before the last day of the anniversary month that the letter of guardianship was signed. The plan must cover the coming fiscal year, ending on the last day of the aforementioned anniversary month.

Rep. Kathleen Passidomo (Elder Law Section's 2015 Legislator of the Year), Twyla Sketchley (ELS past chair) and Jana McConnaughhay (ELS chair) look on as Florida Governor Rick Scott signs House Bill 5. This new legislation makes significant changes to guardianship practices, and members are urged to become acquainted with these changes to see how they may affect you or your practice.

(Photo courtesy of Twyla Sketchley)

Five tips

from page 22

not make payment, terminate your services and withdraw from the case. Some attorneys worry they will be losing a client. If that is your worry, remember the first tip above. You are in business to practice law. If the client is not paying for your services, you need to stop wasting your time and replace that client with one that will pay for your services.

5. Hire someone to do your collections

It is often difficult for a lawyer to be the advocate for clients as well as the clients' "debt" collector. The attorney-client relationship can be strained if you are calling clients about their past due bill. And it may also be difficult to keep them focused on your outstanding bill instead of all the legal questions they want to ask you simply because you called or the tragic tale justifying their lack of payment. This is not to say you should not be the firm's collections person, but it might be difficult. While there are rules regarding hiring an outside firm to do collections for you, hiring someone within your firm or designating an employee to handle collections is usually adequate. Give the designated staff person a script and a form letter or two so he or she will not deviate from the goal of collecting outstanding balances, no matter what the client asks. Then set this staffer to work on any bill that has not been paid within 30 days after the invoice was sent.

***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 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.*

What's in your DPOA? Clauses every elder law attorney should have in their document

The tale: Recently you have had a slew of clients come to your office for planning with durable power of attorney documents they downloaded from the internet. Most of these documents lack the comprehensive language covering any type of planning that you, as an elder law attorney, would recommend. Fortunately most of these clients still have the mental acuity necessary to sign new and improved documents. You have to convince them that your documents are superior.

The tip: What should be in your durable power of attorney document? Aside from the all the usual banking and investment powers, stock powers and other powers typically listed in a DPOA, you want to be sure that your document covers all the reasonable and customary planning techniques used by elder law attorneys.

To begin with, the person named as the agent in the document is often an heir or a descendant of the principal. Be sure to include a clause allowing what might otherwise be considered self-dealing by the agent. This clause may have to be inserted in more than one section to ensure it is effective.

The agent should have the ability to change beneficiaries on investments as well as to modify, rescind, release or terminate annuities and life insurance policies. In addition, the agent should be able to surrender or borrow the cash value and to change the ownership of these policies.

The ability to deal with individual retirement accounts and 401(k)s not only must be specifically enumerated but separately initialed. Again, be sure to allow investment powers as well as the ability to change beneficiaries.

Real estate powers should be broad and detailed. Elder law attorneys often must deal with homestead and income-producing property for a client in need of public benefits. The power to buy, sell, manage, rent, purchase, convey, assign, mortgage or execute deeds including enhanced life estate deeds is a must. In addition, the ability to execute a deed or a mortgage for current or subsequently obtained homestead is crucial. Always include the power to join in the conveyance of homestead. This power is specifically allowed by Florida

Tips & Tales

by
Kara Evans

Statutes § 709.2201(2)(b). You can also give the agent the authority to waive homestead rights in a pre- or post-nuptial agreement. Most durable power of attorney documents have some kind of provision allowing the signing of contracts. Pre- and post-nuptial agreements are just a special kind of contract. Even so, my preference is to enumerate this power specifically as well as the ability to execute loans and promissory notes.

A thorough document will give the agent the authority to apply for public benefits on the principal's behalf. Include the power to create a special needs trust, a qualified income trust, a personal service contract or a personal service trust or to join a pooled trust. Do not forget the ability to sign an assignment of rights to support and to give the agent permission to represent the principal in an action for spousal support not connected with the dissolution of marriage under F.S. § 61.09. On the same note, a provision allowing the agent to create trusts, whether revocable or irrevocable, should be included.

The agent in your DPOA should have the ability to make arrangements and financial commitments for medical care and attention. This clause should include a HIPAA waiver so the agent has the ability to review and exchange the principal's medical records. Be sure to address any conflict that may arise with regard to a health care surrogate's ability to make medical decisions.

When drafting your document, be sure to review F.S. § 709.2202, which sets out the sections and the powers that must be separately initialed or signed.

The clauses necessary to draft an effective power of attorney for elder law purposes are broad and sometimes scary. Including language that reviews the agent's duties and obligations such as acting in good faith and attempting to preserve the principal's estate plan can ease a client's mind and serve as a gentle reminder for the agent to act loyally for the sole benefit of the principal. F.S. § 709.2114 sets out all the agent's duties, and I have recently taken to attaching a copy to my durable power of attorney document so the client and, more important, the agent understand exactly the scope of the agent's responsibilities.

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

Basics of estate and gift tax for non-citizens

Recently there has been a series of questions on the Elder Law Listserv regarding estate and gift taxes for non-citizens. Prior Tax Tip articles have addressed the reporting of undisclosed offshore financial accounts (see, e.g., Offshore financial accounts, IRS Voluntary Disclosure Initiative, "Round Two" in vol. XIX, no. 1, spring 2011, page 9). In addition, the summer 2011 Tax Tips column addressed accounts owned by foreigners, although that article emphasized which assets are and which are not U.S. situs assets.

The law regarding taxation of non-citizens is complex. The general rules are further complicated because the United States has tax treaties with certain other countries. The United States does not have tax treaties with all countries, and all tax treaties are not the same. In addition, some of the treaties address only some aspects of tax, such as income tax and not estate tax.

With that said, there are some general tax rules regarding non-U.S. citizens' estate and gift taxes of which elder lawyers should be aware. Many times a basic understanding of the law is all that is needed to address the issue, or to recognize that assistance is needed.

For estate and gift taxes, there are three categories of individual taxpayer: U.S. citizen, resident alien domiciliary (RAD) and non-resident alien domiciliary (NRAD). To determine domicile (residency) in close cases, get help. Why? The test to determine domicile for estate and gift taxes is different than for income tax, which has somewhat more clear tests of substantial presence and green card. For estate and gift tax, simply stated it is an intent by the NRAD to reside permanently in the United States, with various factors looked at to determine intent (e.g., U.S. "green card").

by Michael A. Lampert

Who and what are subject to estate and gift tax?

U.S. citizens and RADs are subject to estate and gift tax on their worldwide assets.

NRADs are taxed on gifts of U.S. situs assets. Most gifts of intangible U.S. assets are not taxed. Not considered U.S. situs are bank and brokerage accounts that are not U.S. trade or business accounts, and stock in U.S. corporations. The law regarding situs of partnerships and LLCs is not settled for estate tax purposes.

Trap #1

The rules for what are U.S. situs assets for gift tax on NRADs are different than those for estate tax. NRADs may have estate tax inclusion of both tangible and intangible property in the U.S. life insurance on the life of a foreign person, U.S. non-business bank accounts and U.S. treasuries, and other portfolio debt obligations are generally not included.

Tip #1

Always check to see if there is a tax treaty with the NRAD's country of citizenship. If so, special rules may apply, including rules specifying where an asset is deemed located (situs).

Exemption amount—how much?

Citizens and RADs are entitled to the full estate tax exemption amount, indexed for inflation.

NRADs receive only an estate tax (not gift tax) exemption of $60,000. This amount is *not* indexed for inflation.

Reminder: Check to see if a tax treaty changes the treatment.

Tip #2

For an NRAD with a fair market value at death of U.S. situs assets in excess of $60,000, a Form 706 NA is needed.

Trap #2

Don't forget to determine prior lifetime gifts of U.S. situs assets. As with citizens, this can impact the remaining available exemption amount.

Trap #3

U.S. citizens and long-term residents who relinquished their U.S. citizenship or ceased to be U.S. lawful permanent residents (green card holders) on or after June 17, 2008, and who meet specific average tax or net worth thresholds on the day prior to their expatriation are considered "covered expatriates" and are subject to expatriation tax (I.R.C. § 877A.)

U.S. citizens, domestic trusts and probably RADs who receive gifts or bequests after June 17, 2008, from covered expatriates may be subject to transfer tax under IRC § 2801.

So the client says, "Who cares, what can the IRS do anyway?"

The Internal Revenue Service may collect any unpaid estate tax from any person receiving a distribution of the decedent's property under transferee liability provisions of the Internal Revenue Code. In addition, there is also the general estate tax lien that automatically is applied at death.

So, who can give to who (or is it whom?) and with what result?

The following tables provide guidance:

GIFT TAX

From	To
U.S. citizen or RAD	citizen spouse *unlimited marital deduction* citizen, RAD or NRAD non-spouse *current annual exemption* *estate tax exemption (currently $5.43 million*)
U.S. citizen or RAD	RAD or NRAD spouse *annual exemption $145,000* or *estate tax exemption (currently $5.43 million)*
NRAD (U.S. situs property)	citizen spouse *unlimited marital deduction* citizen, RAD or NRAD non-spouse *current annual gift exemption amount of $14,000* *no estate tax exemption* **Note (and little *Trap #4*):**This NRAD grantor category is addressing U.S. situs property. While U.S. citizens and income tax residents need to report a receipt of a gift from an NRAD of non-U.S. situs property, there is generally no federal tax consequences of the gift.

ESTATE TAX

From	To
U.S. citizen or RAD	citizen spouse *unlimited marital deduction* citizen non-spouse and RAD and NRAD spouse and non-spouse *estate tax exemption (currently $5.43 million)* **Tip #3:** If there is a concern about exceeding the exemption amount to a non-citizen spouse, a qualified domestic trust (QDOT) can often be utilized. This allows deferral of the estate tax until the non-citizen spouse dies or the principal is paid out. There are many technical rules regarding QDOTs, but it is a viable planning alternative in appropriate circumstances.
NRAD (U.S. situs property)	citizen spouse *unlimited marital deduction* citizen non-spouse *$60,000 exemption* RAD or NRAD spouse or non-spouse *$60,000 exemption*

What about portability?

Using the deceased spouse unused exemption amount (DSUE), U.S. citizens and RADs may elect portability. NRADs generally cannot elect portability unless a treaty applies. Treaties might allow the use of the DSUE and even allow for a higher exemption amount for NRADs than the usual $60,000. Careful consideration of the portability exemption must be made when utilizing a QDOT.

Note: The QDOT referred to above can also be utilized for NRAD gifts at death to a RAD or an NRAD spouse.

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

Summary of selected case law

by Brandon Arkin

Undue influence: Wicked new spouse

Blinn v. Carlman, 159 So. 3d 390 (Fla. 4th DCA 2015)

The decedent's will was declared invalid by the trial court due to undue influence by the decedent's fourth wife. In 2005, the decedent was showing signs of mental and physical infirmities. He married his fourth wife in 2007. The wife began to alienate the decedent from his family. Evidence of the alienation was captured on voicemail when the wife called the daughter. In 2008, two attorneys were involved in changing the decedent's estate plan at the direction of the wife and without ever speaking to the decedent. The changes completely altered his estate plan by removing his family and leaving everything to the wife instead. The appellate court believed there was substantial evidence supporting the judge's ruling and affirmed.

Statute of limitations: Time to file medical malpractice claim

Barrier v. JFK Med. Ctr. Ltd. P'ship, 40 Fla. L. Weekly D 1410 (Fla. 4th DCA 2015)

The appellant as guardian of her incapacitated son filed a medical malpractice claim on his behalf since he was in a coma from a drug overdose. The defendants objected based on the statute of limitations. The court granted summary judgment for the defendants, ruling that the statute of limitations ran from the appellant's appointment as emergency temporary guardian and that she had knowledge of the possibility of a medical malpractice. The appeals court reversed, holding that the temporary nature of an emergency temporary guardian does not impose the legal duty to protect the ward's interest in a medical malpractice claim and that the statute of limitations does not run until the ward is declared incapacitated and a guardian of the property is appointed.

LLC operating agreement: Make sure your estate plan is coordinated

Blechman v. Estate of Blechman, 160 So. 3d 152 (Fla. 4th DCA 2015)

The issue in this case was whether the decedent's 50 percent ownership in an LLC was part of his probate estate subject to his will or passed by operation of law pursuant to the LLC operating agreement. The decedent had a pour over will and a trust, which bequeathed his membership interest to a trustee for the benefit of his girlfriend. This bequest consisted of $5,000 a month from the LLC to pay for upkeep on the home, in which the decedent gave his girlfriend a life estate and after her death the remainder to his children. The operating agreement listed three ways a membership interest could transfer upon death, once of which was to will ownership to immediate family members. The girlfriend argued that since the children had a vested remainder, the bequest should stand, and the trial court agreed. The appellate court reversed, stating that the agreement provided that the interest must be willed to an immediate family member, not to a trustee for the benefit of another. Failure to follow this provision of the agreement triggered the provision that the decedent's interest immediately vested to his children. Therefore, by operation of law, the ownership interest passed outside the estate.

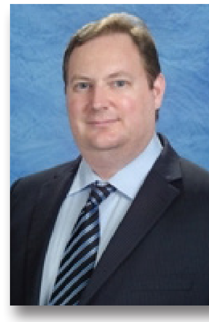
Validity of trust: Make sure to include your beneficiaries

Megiel-Rollo v. Megiel, 162 So. 3d 1088 (Fla. 2nd DCA 2015)

In 1992, the decedent created a will leaving her home to her three children in equal shares. Then in 1997, she created a revocable living trust for her benefit during her lifetime and upon death stated that the home shall be divided between the beneficiaries as tenants in common to their respective interests as set forth in the schedule of beneficiaries. The drafting attorney, however, neglected to create and attach the schedule as instructed by the decedent. Her intent was to leave the home to two of her three children. Sharon, the daughter who was to be excluded from the trust, filed for declaratory relief, seeking the trust to be declared void for lack of a beneficiary and requesting that the home pass in accordance with the 1992 will. The other daughter and her brother filed a counterclaim seeking judicial reformation of the trust pursuant to Florida Statutes § 736.0415. Duel motions for summary judgment were filed, and the circuit court ruled in favor of Sharon, stating that the trust was void ab initio because there were no beneficiaries and thus no trust was created that the court could reform. The appeals court reversed, finding that since the decedent was the beneficiary of the trust during her lifetime, there was a valid trust that could be reformed. Further, the affidavit from the drafting attorney stating his error and the decedent's intent was enough to avoid summary judgment.

After divorce remember to update your estate planning
Carroll v. Israelson, 2015 Fla. App. LEXIS 9965, 40 Fla. L. Weekly D 1522 (Fla. Dist. Ct. App. 4th Dist. July 1, 2015)

A childless decedent passed away one month after divorcing his wife, but before he could change his will. His will left everything to his ex-spouse and if she predeceased him to her trust, which would leave everything to her niece and nephew. The decedent's mother, who was not in the will, sought to have it invalidated. The circuit court determined that the wife predeceased and created new twin irrevocable trusts for the benefits of the niece and nephew. The appeals court reversed and found that the wife should not be treated as if she predeceased and that any provision in the will after the divorce that affects her is to become void pursuant to F.S. 732.507(2). The appeals court found that since the wife was still alive and the secondary beneficiary was a revocable trust the wife controlled, she was affected by having the money left to that trust and she could alter the terms to her benefit. Therefore, any provisions in the will that "affect" her are void and a nullity.



Brandon Arkin is an associate at Glantzlaw in Plantation. He practices primarily in the areas of family law and estate planning.

Fair Hearings Reported

by Diana Coen Zolner

***Petitioner v. Respondent*, Appeal No. 14N-00093 (July 21, 2014)**

The petitioner was admitted to the nursing home in December 2013. Subsequent to his admission, the petitioner's daughter authorized the nursing home to apply for Medicaid Institutional Care Program (ICP) benefits on his behalf. The nursing home applied for benefits in January 2014, and the application was denied. The application was then re-opened in March 2014. In May 2014, the nursing home sent the petitioner a transfer and discharge notice listing the reason for discharge as failure to pay for services provided at the facility after reasonable and appropriate notice to pay.

The facility assumed that because the petitioner's application was denied for January 2014 that he would be responsible for full payment of the outstanding balance of services he received for December 2014, January 2015 and February 2015. The outstanding balance for these three months was $34,287.53. Beginning in March 2014, the respondent only charged the petitioner his anticipated patient responsibility, and the petitioner made regular monthly payments of that amount. No payment agreement was entered into for the outstanding balance. As of the date of the hearing in this matter, the Department of Children and Families (DCF) had not made a decision on the petitioner's application for ICP benefits.

At issue in this appeal was the facility's intent to discharge the petitioner due to non-payment of a bill for services. The facility had the burden of proof to establish by clear and convincing evidence that the discharge was appropriate under federal regulations 42 C.F.R. § 483.12. The regulation at 42 C.F.R. § 483.12(a) states that discharge is appropriate only after "[t]he resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility." As noted previously, the petitioner had a Medicaid ICP application pending for which he was seeking benefits to pay for the nursing care charges in question. As a result, it was unknown whether the benefits would be granted and/or whether the effective date for any benefits would cover the unpaid months of December 2014 through February 2015. Therefore, it was also unknown what, if any, amount would still be owed to the nursing facility.

Furthermore, the Centers for Medicare and Medicaid Services State Operations Manuel Appendix PP - Guidance to Surveyors for Long Term Care Facilities sets forth appropriate guidelines as follows:

> Guidelines § 483.12 ... A resident cannot be transferred for non-payment if he or she has submitted to a third party payor all of the paperwork necessary for the bill to be paid. Non-payment would occur if a third party payor, including Medicare or Medicaid, denies the claim and the resident refused to pay for his or her stay.

Based on these guidelines, the hearing officer concluded that since a Medicaid application was pending, the discharge notice was premature. The petitioner's appeal was granted, and the facility was instructed to wait until the Medicaid application was processed before proceeding with a discharge action. In conclusion, a resident cannot be discharged/transferred for non-payment until: 1) the Medicaid application is disposed of; 2) the petitioner is given adequate notice of any outstanding balance after Medicaid payments are made to the facility; and 3) the resident refuses to pay the outstanding balance due.

***Petitioner v. Respondent*, Appeal No. 14F-00785 (April 2, 2014)**

The petitioner in this matter was an elderly woman diagnosed with dementia and Parkinson's disease. She required assistance with all activities of daily living (ADLs) and suffered from stranger anxiety and hallucinations. At the time of the appeal, she was receiving a nurse visit from hospice every other week, six hours of personal care assistance for bathing each week and 15 hours of respite care weekly. These services were provided to the petitioner through hospice and Coventry Health Care, which is a contracted Medicaid long-term care provider in Florida. The petitioner resided with her daughter, son-in-law and 12-year-old grandchild. The petitioner's daughter worked approximately 50 to 60 hours a week between her full-time and part-time jobs. The petitioner's son-in-law was dealing with a heart condition and hospitalizations that required assistance from the petitioner's daughter. The petitioner's daughter was extremely stressed and sleep deprived from caring for her mother, her husband and her 12-year-old child, all while working 50 to 60 hours per week. The petitioner's son-in-law was unable to assist in the petitioner's care due to his own illness, and there was no other family support available in the area.

The petitioner's daughter did not want to place the petitioner in any kind of facility for care. As a result, she hired a live-in caregiver to assist her in caring for the petitioner. She could not afford to pay for the caregiver much longer, however, and the caregiver wanted to move out of the home for personal reasons. The caregiver assisted the petitioner during the day while the daughter was at work. When the petitioner's daughter

continued, next page

was home, the caregiver assisted her with the petitioner until she went to bed. The petitioner's daughter took over care of the petitioner on the caregiver's two days off per week and at night so that the caregiver could sleep. Due to her dementia, the petitioner was anxious at night and required her daughter's attention and assistance to calm her down. The petitioner's daughter also woke up at night to assist her ill husband when his condition worsened. As a result of trying to care for two individuals, the petitioner's daughter suffered from intense stress and lack of sleep, which in turn affected her performance at work.

Prior to the appeal, the petitioner received 15 hours of respite care per week. Those hours were used on two days (for 7.5 hours per day) in order to give the live-in caregiver a break. The petitioner requested an additional 15 hours of respite care to assist with supervising and aiding the petitioner with her ADLs as needed. Coventry denied the petitioner's request for an additional 15 hours of respite care, with the reason given as: "The member's care plan has been assessed, and the current amount of hours being provided is sufficient to meet the member's needs." The respondent argued at appeal that the long-term care program is supposed to be a supplemental program and is not intended to provide total care. The plan does not provide supervision services, only medically necessary services, while contracting out to other providers like hospice to ensure the member receives the necessary care.

As the matter involved a request from the petitioner for additional service hours, the burden of proof was assigned to the petitioner pursuant to Florida Administrative Code Rule 65-2.060(1), and the standard of proof needed to be met was a preponderance of the evidence. The petitioner's daughter argued that the petitioner required total care and that as the petitioner's primary caregiver she could not deal with the stress much longer. She further argued that she did not have the ability to do everything necessary to care for her family and the petitioner and that as a result she needed additional help, especially once the live-in caregiver moved out.

After reviewing the relevant regulations, the hearing officer determined that respite care is not covered under the standard Medicaid plan, but may be covered by certain other Medicaid waiver programs and by the long-term managed care program. Florida Statutes § 409.98 lists the minimum care that long-term care plans are required to offer. Hospice care, personal care and respite care are the relevant services to the petitioner on this list. However, respite care as set forth in Florida Administrative Code Rule 59G-13.080(3)(w) and in Coventry's managed care contract is for short-term help for the caregiver when the caregiver is unavailable or requires relief. Respite care is intended as a supplemental service and not as a substitute for the daily care that a member needs. In applying the facts of this case to the relevant regulations, the hearing officer determined that the live-in caregiver was available to assist the petitioner at night and on respite days, but that the daughter did not utilize the caregiver at these times. Furthermore, the petitioner was already receiving 15 hours of respite care, and some of those hours could be reallocated so that both the petitioner's daughter and the caregiver could benefit from the respite care relief when needed.

As a result, the hearing officer determined that an additional 15 hours of respite care was in excess of the petitioner's needs and that respite care was not an appropriate long-term care service. The hearing officer further determined that because the petitioner required total care and assistance with her ADLs, she might be eligible for other services such as attendant care or personal care services when the live-in caregiver chose to move out. Furthermore, if the live-in caregiver decided to leave permanently, then increasing respite hours would not be appropriate because it would be a substitute for the caregiver's services rather than the intended temporary relief. Therefore, the petitioner's appeal was denied.

***Petitioner v. Respondent*, Appeal No. 11F-03223 (July 29, 2011)**

In this appeal, the petitioner requested a $500 per month increase in the spousal income allowance deducted from his patient responsibility. The petitioner applied for ICP benefits as of January 2011. The petitioner resided in a nursing home, and his wife resided in the community at an assisted living facility. The petitioner did not dispute the income used by the respondent, but requested an increase in the spousal allowance as necessary to pay for the petitioner and the community spouse's care. The petitioner's daughter provided receipts that she was paying bills for the petitioner's food, outings and clothing, as well as for personal care items for the community spouse not provided by the assisted living facility. In addition to these items, the daughter provided receipts for bills of the community spouse such as clothing, groceries, travel, manicures, pedicures, hair appointments, newspapers, crafts, cigarettes, medical copays and a companion. The daughter asserted that the only service the assisted living provided to the community spouse was to administer her prepackaged medications and that as a result she needed additional income to pay for the cost of her daily needs. Additionally, the community spouse had unexpected medical expenses as follows: teeth removal and dentures in September 2010; a hysterectomy due to cervical cancer in January 2011; several broken bones, including a broken hip as a result of a fall in February 2011; rehabilitation services due to the fall for February, March and April 2011; and a new hearing aid in June 2011.

The hearing officer determined that pursuant to Florida Administrative

Code § 65-2.060(1) the burden of proof was on the petitioner. Additionally, the hearing officer determined that Florida Administrative Code 65A-1.712 sets forth the guidelines for income diversion from the institutionalized spouse to the community spouse. After review of the regulations, the hearing officer determined that to increase the maximum maintenance income allowance to include an expense, the expense must pass a two-part test. First, the expense must be an exceptional circumstance, and second, the expense must create significant financial distress. Expenses that are in the normal course of everyday living, such as food and shelter expense, are not exceptional circumstances. The rule indicates that an exceptional circumstance that results in extreme financial duress is when a community spouse incurs unavoidable expenses for medical, remedial and other support services. Clothing, groceries, travel, hair appointments, manicures, medical co-pays, cigarettes, newspapers, personal care items and a companion are expenses of everyday living and therefore do not meet the criteria for exceptional expenses. As a result, an increase in the community spouse income allowance for these expenses was denied. Furthermore, it was determined that the community spouse paid $650 per month to the assisted living facility for personal care services. Although this could be for services considered to be a medical need, no evidence was submitted that the community spouse's medical condition would require additional personal care to meet a medical need. Therefore, the $650 personal care expense was expected and not a sudden, unavoidable expense. The hearing officer found, however, that the community spouse did have additional unexpected medical expenses due to her surgery, fractures and need for a new hearing aid. The petitioner submitted medical bills demonstrating that these expenses resulted from exceptional circumstances that could create significant financial distress to the community spouse.

Therefore, the hearing officer concluded that the community spouse's unexpected medical expenses were exceptional expenses resulting in a significant inadequacy of the allowance to meet her needs. The hearing officer further narrowed his ruling by stating the rules set forth that if the expense causing an exceptional circumstance is a temporary expense, then the increased allowance must be adjusted to remove the expense when no longer needed. Consequently, the hearing officer granted an increase in the community spouse income allowance of $500 for the months of January 2011 through July 2011 only.

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.*

Call for papers – *Florida Bar Journal*

David Hook is the contact person for publications for the Executive Council of the Elder Law Section. Please email David at *dhookesq@elderlawcenter.com* for information on submitting elder law articles to The Florida Bar Journal for 2015-2016.

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.

The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300

PRSRT-STD
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43

FAIR HEARINGS REPORTED

The Florida Bar Elder Law Section is proud to announce a new project – Indexing of the Fair Hearing Reports online. This project is sponsored by The Center for Special Needs Trust Administration Inc., *www.sntcenter.org,* 877/766-5331. Indexing will begin to appear online as the project proceeds until completion.

The reports are posted on the section's website at *www.eldersection.org* and are available to subscribers.

ANNUAL SUBSCRIPTION: $150 (#8060050)
July 1 - June 30

****

Fair Hearings Reported

ORDER FORM

NAME: ______________________________ Bar #: ________________
ADDRESS: ____
CITY/STATE/ZIP: ____
EMAIL ADDRESS: ____
PHONE: (______) ____________________________

METHOD OF PAYMENT:

❑ Check (in the amount of $150) payable to: "The Florida Bar Elder Law Section"
❑ Master Card ❑ VISA ❑ American Express

Card No.: ______________________________ Expires:____/_____
Name of Cardholder: ____
Signature: ____

FAX TO: 850/561-9427.
MAIL TO: The Florida Bar Elder Law Section, 651 East Jefferson Street, Tallahassee, FL 32399-2300