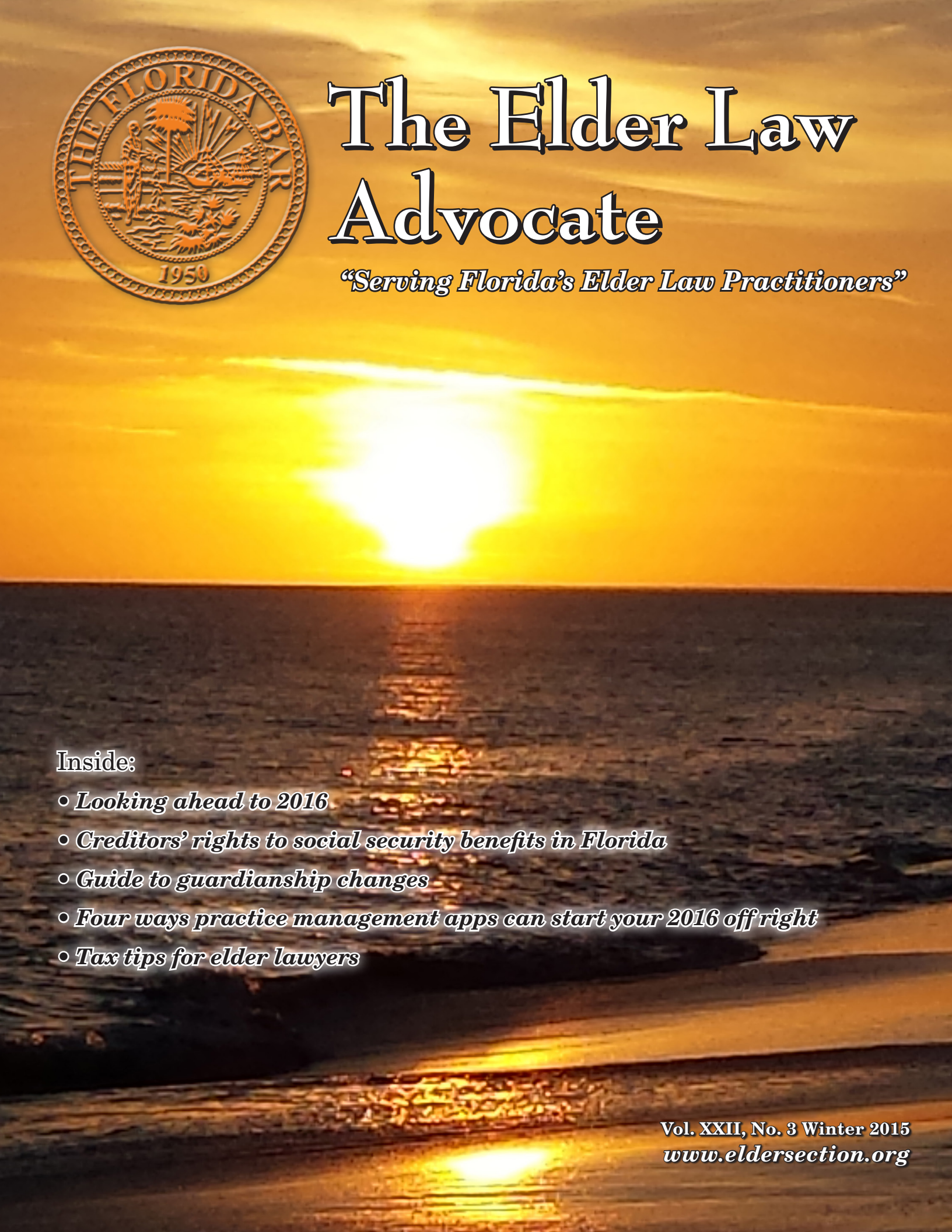

The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Inside:

- *Looking ahead to 2016*
- *Creditors' rights to social security benefits in Florida*
- *Guide to guardianship changes*
- *Four ways practice management apps can start your 2016 off right*
- *Tax tips for elder lawyers*

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The Elder Law Advocate

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COVER ART

Alligator Point Winter

by Arlee J. Colman

12/2015

Contents:

The deadline for the SPRING 2016 EDITION is March 1, 2016. Articles on any topic of interest to the practice of elder law should be submitted via email as an attachment in MS Word format to Kristina M. Tilson at *kristinatilson@gmail.com*, or call Arlee Colman at 800/342-8060, ext. 5625, for additional information.

Corrections:

*The **Florida Supreme Court** issued Advisory Opinion N. SC14-211 – "Medicaid Planning Activities by Nonlawyers." An editing error resulted in incorrectly identifying the court in the article "What elder law attorneys need to know about working with non-attorney Medicaid companies," which appeared in the fall 2015 edition.*

***Jana McConnaughhay** is the author of "Elder Law Section helps bring Elder$mart$ to Florida." The article was incorrectly attributed in the fall 2015 edition.*

Looking ahead to 2016

We are quickly approaching the end of the year, and so I turn our attention to the opportunities and challenges I see on the horizon for 2016.

Since my last message, we have received word that the U.S. Supreme Court has denied cert review of the UPL decision. We hope this will end the appeals so we can settle in and see how the Florida Supreme Court's earlier ruling will affect the unlicensed practice of law in regard to Medicaid planning.

As of this writing, Senator Nancy Detert's Senate Bill 232 now has a companion, House Bill 403 filed by Representative Larry Ahern. This legislation, if passed and signed into law, would rename the current Statewide Guardianship Public Guardianship Office to the Office of Public and Professional Guardians (OPPG). This newly created administrative office would oversee the registration of all professional guardians in the state of Florida. The OPPG would also establish rules of conduct and institute disciplinary proceedings for violations of these rules. This legislation appears to be moving forward; funding may be the only thing that stops the new OPPG from becoming a reality.

If you have not done so already, please reserve your room for the upcoming Elder Law Essentials and Annual Update. Chair-Elect Ellen Morris and Collett Small have been working hard to line up speakers for this great program to be held Jan. 14-16, 2016. As in the past few years, Thursday will be devoted to The Essentials of Elder Law while Friday and Saturday will include the Annual Update and Hot Topics. We have a block of rooms available at the Loews Portofino Bay Hotel at Universal in Orlando for only $199! But you have to make your reservation before Dec. 23 to get this reduced rate. See the brochure in this edition of the *Advocate* for all the details.

We just returned from our annual Elder Law Section Retreat in New Orleans. Although attendance was low, it was a typical number for an out-of-state retreat. Ellen Morris is already starting to put together plans for our retreat next year. Ellen hopes to hold the 2016 retreat at Amelia Island (about as close to being out of state as possible without actually leaving Florida!). I've never been to Amelia Island, and I look forward to attending. I'm sure as soon as we have some dates, we will get them out to the membership so you can block off that weekend on your calendars.

Message from the chair

David Hook

For those of you who did not attend the retreat, you missed an excellent presentation from Jeff Richardson (*iphonejd.com*) on using iPads and iPhones in your practice. We even learned the shortcut keystroke for the § symbol! (Ask someone who attended the retreat how to do it—you'll start looking for ways to use it in your text messages just to show off.)

During the retreat we also began identifying members of the section to attend our first Elder Law Section strategic planning meeting. Randy Bryant has generously offered the section the use of his office in Oviedo (Orlando area) to hold the meeting. Karl Sprague has agreed to facilitate the meeting, as he has done for AFELA for the past couple of years. The goal of the Strategic Planning Committee is to help define who we are as a section, what our goals are and how we can best serve our membership.

Our members are usually also members of other organizations such as AFELA, RPPTL, FSGA, Wealth Counsel, Elder Counsel or any number of other organizations. One question I personally would like to present to the Strategic Planning Committee is this: What does the Elder Law Section offer to our members that these other organizations don't?

Other questions I would like to pose include:

- How can we best provide services to our members?
- What services or benefits of membership do our members want that we are not currently providing or we could provide better?
- How many CLEs should we provide each year and on what topics?
- Should the CLEs be live, or should we spare the expense and rely on web-based CLEs?

I am very pleased that all of the current section leadership—Ellen, Randy, Jason Steven and Collett—have agreed to participate in the Strategic Planning Committee. They are dedicated to continuing the process through their terms of office with the section. Our goal is to define the section's goals and to build value for our members. We plan to have our first strategic planning meeting in February.

Creditors' rights to social security benefits in Florida

by Michael A. Sneeringer and Alan S. Gassman

At least 63.2 million people annually receive some form of social security benefits.[1] The vast majority of recipients are wholly or primarily dependent on said benefits. It was therefore wise and understandable that both Congress and the Florida Legislature saw fit to safeguard not only these benefits, but also accounts holding moneys funded by such benefits.

The basic analysis of those who read the statutes is that since social security benefits are "protected" under federal and Florida law, upon receipt of one's social security check, the benefits should be deposited into a segregated social security benefits bank account so that the "protected" funds are traceable to one account.

Title 42, Chapter 7 of the U.S. Code discusses social security benefits. Specifically, § 407 explains as follows:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.[2]

Unfortunately, the reality is that social security benefits are not exempt in Florida due to activist or mistaken judicial decisions that have proliferated to as high as the U.S. Court of Appeals for the Eleventh Circuit.

This article will review the case law and, it is hoped, educate practitioners on how this problem has occurred and continues to proliferate and endanger the financial security of countless numbers of elderly social security recipients and those dependent on them.

State and federal statutes

Social security "benefits" are composed of a broad category of payment forms including child support payments that are processed pursuant to Part D of Title IV of the Social Security Act, retirement and survivors' benefits, supplemental security income benefits and disability insurance benefits.[3] Section 207 of the Social Security Act protects social security benefits from garnishment, levy or other withholdings.[4] There are exceptions, most notably including enforcement of child support and alimony obligations,[5] a levy to collect on overdue federal taxes,[6] to withhold and pay another federal agency for a non-tax debt owed to said federal agency[7] and civil penalties under the Mandatory Victim Restitution Act.[8] It is important to keep in mind that in most cases the recipient of benefits has spent decades paying into the social security system in the form of taxes, in exchange for the governmental promise of financial security for U.S. workers and their families.

Florida Statutes § 222.201(1) sets out the exemption for social security benefits for Florida residents: "Notwithstanding s. 222.20, an individual debtor under the federal Bankruptcy Reform Act of 1978 may exempt, in addition to any other exemptions allowed under state law, any property listed in subsection (d)(10) of s. 522 of that act."[9] Social security benefits are listed under subsection (d)(10) of Section 522 of the federal Bankruptcy Reform Act of 1978.[10]

Case law

The case law from the U.S. Court of Appeals for the Eleventh Circuit (the Eleventh Circuit) and Florida bankruptcy courts appears to contradict the various courts and jurisdictions in the United States with regard to whether identifiable accumulated social security benefits remain protected from creditors.[11] The Eleventh Circuit, the same circuit that has appellate jurisdiction over the district courts in the state of Florida, found that the exemption available under Section 407(a) will *not* apply when the "reaching of Social Security benefits is not going to impair the ability of the recipient to satisfy his or her basic needs."[12]

U.S. Court of Appeals for the Eleventh Circuit (Alabama and Georgia)

In *Citronelle-Mobile Gathering, Inc., v. Watkins*, a case originating from the Southern District of Alabama, the Eleventh Circuit was asked to exempt an exceptionally wealthy and apparently sinister debtor's social security payments from garnishment.[13] The debtor cited previously decided cases from different federal circuit courts, including one from the U.S. Supreme Court, for his argument that 42 U.S.C. § 407 exempted his social security from garnishment.[14] In three of the cases cited, however, the court protected the debtor's social security because it was the debtor's *only* source of income.[15] The debtor's financial picture in *Citronelle* was different from the three cited cases and was described as follows:

> Chamberlain's situation starkly contrasts with the compelling situations just described. Chamberlain's trying to protect some twenty three hundred dollars which had been deposited in an account containing $63,000 which has been heavily drawn on is enough to distinguish it from the cases cited above. But once one considers the facts that Chamberlain has sole control over corporate assets of over $10 million and has managed to flee to Switzerland, his attempts to protect this small amount of funds *appear almost ridiculous*. A brief scan of Chamberlain's list of assets makes clear that the Social Security funds at issue will not mean the difference between desperation and subsistence. To protect these Social Security payments of $2,826.00 which had been deposited into an account with tens

> of thousands of other dollars would make a mockery of the purposes of the Social Security payments in general as well as the protections of them provided by § 407 (emphasis added).[16]

The court relied on three other cases from the Eleventh Circuit to hold that the debtor's social security was not protected from garnishment where the debtor's ability to care for himself was not implicated and the assignment of social security benefits would not affect the debtor's ability to secure basic care and maintenance.[17] One of the cases relied upon by the Eleventh Circuit stated:

> The reason for exempting social security benefits from creditors' claims is to insure the needy have the necessary resources for continuing basic care and maintenance … we previously have rejected a construction that would bar creditors where the statutory objective of preserving essential resources for the debtor could not have been effectuated.[18]

What the three other cases cited in *Citronelle* had in common is that they were not decided by a Florida court.[19] However, three Florida bankruptcy court cases have followed the holding in *Citronelle*.[20]

U.S. Court of Appeals for the Eleventh Circuit (Florida)

In *In re Crandall*, the court sought to ascertain whether the implied exception to 42 U.S.C. § 407 as articulated in *Citronelle* was applicable.[21] The bankruptcy court analyzed whether the reaching of social security benefits would impair the debtor's ability to satisfy her basic needs as follows:

> Debtor filed a Petition for Relief under Chapter 7 of the Bankruptcy Code on July 28, 1995. At the time of filing, the Debtor had approximately $10,000.00 in the Nations Bank account which she claimed as exempt pursuant to 42 U.S.C. § 407. The Trustee filed an objection. At the hearing, the Debtor also claimed that the funds were exempt under section 222.201(1) of the Florida Statutes. The Debtor testified that the only money deposited in the Nations Bank account has been the June 1995 social security disability award and subsequent monthly social security disability payments. A portion of the social security award was utilized by the Debtor to purchase a mobile home. The Debtor presented evidence that she receives $789.00 per month from social security disability while her monthly expenses total $766.67. (Doc. 18, Exs. 3, 4) … Although the Debtor's monthly income covers her monthly expenses, it does so just barely. Because the Debtor is disabled and unemployed and her income minimally covers her monthly expenses, the court is concerned that the Debtor's ability to satisfy her basic needs may be impaired should unforeseen expenses occur. The court finds that a portion of the accumulated social security disability benefits should be declared exempt to ensure that the Debtor has the necessary resources for continuing basic care and maintenance. The Trustee's Objection to Property Claimed as Exempt is due to be sustained. The exemption is allowed in the amount of $5,000.00 with the remainder of the accumulated social security disability benefits in the Debtor's bank account, as of the date of the filing of the petition, property of the bankruptcy estate and shall be paid to the Trustee.[22]

In *In re Lazin*, the U.S. Bankruptcy Court for the Middle District of Florida held that in order to determine whether social security benefits could be reached by the trustee, it must ascertain whether the debtor has the "necessary resources for continuing basic care and maintenance without the accumulated Social Security benefits."[23] In holding that the exemption under § 522(d)(10)(A) does not exempt accumulated social security benefits, the court in *In re Sluis* followed the holding in *In re Lazin*.[24]

All other federal circuits

In *In re Radford*, the U.S. Bankruptcy Court for the Western District of Missouri reasoned that the Eleventh Circuit cases intended to gloss a necessity requirement into 42 U.S.C. § 407 as to benefits already paid, due to cases like *In re Crandall* and *Citronelle* relying on *In re Treadwell*.[25] *In re Treadwell* relied upon the prior version of 42 U.S.C. § 407, which did not include subsection (b) that says: "[n]o other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section."[26] The judge in *In re Radford* interpreted the words "paid or payable" in 42 U.S.C. § 407(a) to mean that Congress intended to protect both future social security payments and identifiable accumulated social security payments from the claims of creditors, and that "[t]here is no necessity requirement as to social security benefits already paid as long as a debtor explicitly claimed those payments as exempt pursuant to Section 407."[27]

In re Franklin, a March 2014 case, went one step further than the court in *In re Radford*.[28] It stated that "[C]ongress has strongly expressed its policy of protecting social security benefits, and it is not for the courts to read an implied exception into § 407. The Court determines that on the record before the Court, the TRUSTEE has failed to establish that any valid basis exists to deny all or any portion of the exemption claimed by the DEBTOR in the savings account funds under § 407."[29]

The *In re Franklin* court acknowledged the decisions in the Eleventh Circuit, but noted that a 2014 U.S. Supreme Court case, *Law v. Siegel*, 134 S. Ct. 1188 (2014), abrogated the Eleventh Circuit decisions.[30] In *Law*, the U.S. Supreme Court stated:

> § 522 does not give courts discretion to grant or withhold exemptions based on whatever considerations they deem appropriate. Rather, the statute exhaustively specifies the criteria that will render property exempt … The [Bankruptcy] Code's meticulous—not to say mind-numbingly detailed—enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions.[31]

Footnote four of the *In re Franklin* court's opinion states as follows:

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> To this Court's awareness, *Citronelle-Mobile's* implied exception to § 407 has never been adopted by any federal court outside the 11th Circuit. The only lower court decision that actually enforced the implied exception is *In re Crandall*, 200 B.R. 243 (Bankr. M.D. Fla. 1995), where the court found a middle ground, permitting the debtor to exempt half of her accumulated social security benefits. The implied exception was readily rejected by the court in *In re Radford*, 265 B.R. 827 (Bankr. W.D. Mo. 2000).[32]

Secondary sources

There are secondary sources that recognize the limitation in the Eleventh Circuit. For example, one source states that "in the Eleventh Circuit, there is an implied exemption to 42 U.S.C.A. § 407 that permits the garnishment of Social Security payments if garnishment does not impair the ability of the social security recipient to satisfy basic needs."[33] However, the authors have not found a secondary source addressing the recent cases of *Franklin* and *Law*, in the context of how those cases might be applied by judges in the Eleventh Circuit.

Suggested solution

Until the case law rights itself, or the legislatures act, Florida law will continue to be harsh and inconsistent with that outside of the Eleventh Circuit for debtors who deposit their social security checks into financial and bank accounts, despite the holdings in *Franklin* and *Law*. Since *In re Sluis* in 1998, there appears to be no other reported cases from the Florida bankruptcy courts that have addressed this issue, nor have there been any reported cases addressing Florida Statutes § 222.201(1) in the social security exemption context. From conversations with other Florida estate planning attorneys and debtor/creditor right's attorneys, this area has not been focused on, and attorneys have differing opinions on whether social security is exempt.

Therefore, planners recommend that clients invest social security benefits in 529 college savings plans, annuities and other protective mechanisms where there are no current creditor claims (so as to avoid the appearance of a fraudulent conveyance). Such vehicles are creditor exempt during a debtor's lifetime and can remain exempt upon the death of the debtor.[34]

Endnotes

[1] 2013 figures, see Soc. Security Admin., *Fast Facts & Figures About Social Security*, Sept. 2014 available at http://www.ssa.gov/policy/docs/chartbooks/fast_facts/2014/fast_facts14.pdf

[2] 42 U.S. Code 407. *See Dapp v. Dapp*, 65 A3d 214, 219–220 (Md. App. 2013). In addition, courts of other states have held that section 407 bars enforcement of provisions in marital property settlement agreements that purport to divide future social security benefits between spouses. *See, e.g., In re Marriage of Anderson*, 252 P.3d 490, 494 (Colo.App.2010) ("the transfer of future and as yet unpaid Social Security benefits from husband to wife ... constituted a transfer of husband's rights to future benefits in violation of 42 U.S.C. § 407(a), and the district court lacked jurisdiction to enforce it.") (italics omitted); *Simmons v. Simmons*, 370 S.C. 109, 634 S.E.2d 1, 4 (2006) ("state courts are without power to take any action to enforce a private agreement dividing future payments of Social Security when such an agreement violates the statutory prohibition against transfer or assignment of future benefits."); *In re Marriage of Hulstrom*, 342 Ill.App.3d 262, 276 Ill.Dec. 730, 794 N.E.2d 980 (2003).

[3] *See generally* 42 U.S. Code chap. 7, subchap. XVI, including 42 U.S. Code §§ 407 & 1383.

[4] *See* 42 U.S. Code §§ 407 & 1383.

[5] 42 U.S. Code § 659.

[6] IRC 6334(c).

[7] Debt Collection Improvement Act of 1996 (Public Law 104-134).

[8] 18 U.S. Code § 3613.

[9] Fla. Stat. § 222.201(1).

[10] 11 U.S. Code § 522(d)(10)(A).

[11] *See In re Radford*, 265 B.R. 827 (Bankr. W.D. Mo. 2000), followed in *In re Franklin*, 506 B.R. 765, 772 (Bankr. C.D. Ill. 2014).

[12] *See Citronelle-Mobile Gathering, Inc. v. Watkins,* 934 F.2d 1180, 1192 (11th Cir. Ala. 1991) ["*Citronelle*"], followed in *In re Crandall*, 200 B.R. 243, 244 (Bankr. M.D. Fla. 1995), and acknowledged recently in *U.S. v. Owen*, 2015 WL 3397551 (S.D. Ga. May 26, 2015) (decision deferred on other grounds).

[13] *Citronelle*, 934 F.2d at 1191.

[14] *See Id*. at 1191-92 (citing to *Harris v. Bailey*, 675 F.2d 614, 615 (4th Cir.1982), *Finberg v. Sullivan*, 634 F.2d 50, 51 (3d Cir.1980), *Tidwell v. Schweiker*, 677 F.2d 560, 563 (7th Cir.1982), and *Philpott v. Essex*, 409 U.S. 413 (1973) (for the proposition that social security payments are exempt from garnishment).

[15] *See Harris v. Bailey*, 675 F.2d 614, 615 (4th Cir.1982); *Finberg v. Sullivan*, 634 F.2d 50, 51 (3d Cir.1980); *Philpott v. Essex*, 409 U.S. 413 (1973).

[16] *Citronelle*, 934 F.2d at 1192.

[17] *Id*. at 1192.

[18] *In re Treadwell*, 699 F.2d 1050 (11th Cir. 1983).

[19] *U.S. v. Devall*, 704 F.2d 1513 (11th Cir. 1983) (appeal from the U.S. District Court for the Middle District of Alabama); *In re Treadwell*, 699 F.2d 1050 (11th Cir. 1983) (appeal from the U.S. Bankruptcy Court for the Southern District of Georgia); and *Depart. of Health & Rehabilitative Services v. Davis*, 616 F.2d 828 (5th Cir. 1980) (appeal from the U.S. District Court for the Middle District of Alabama).

[20] *See In re Lazin*, 217 B.R. 332 (Bankr. M.D. Fla. 1998); *In re Sluis*, 228 B.R. 775 (Bankr. M.D. Fla. 1998); *In re Crandall*, 200 B.R. 243 (Bankr. M.D. Fla. 1995).

[21] *In re Crandall*, 200 B.R. 243 (Bankr. M.D. Fla. 1995).

[22] *Id*. at 243, 245.

[23] *In re Lazin*, 217 B.R. at 335.

[24] *In re Sluis*, 228 B.R. 775, 776 (Bankr. M.D. Fla. 1998).

[25] *In re Radford*, 265 B.R. at 829-31.

[26] *Id*. at 830.

[27] *Id*.

[28] *In re Franklin*, 506 B.R. 765 (Bankr. C.D. Ill. 2014).

[29] *Id.* at 772.

[30] *Id*. at 770-72.

[31] *Law v. Siegel*, 134 S. Ct. 1188, 1196 (2014).

[32] *In re Franklin*, 506 B.R. at 772.

[33] 11 Fed. Proc., L. Ed. § 31:25 (updated Dec. 2012).

[34] *See* Fla. Stat. § 222.14; *Connor v. Seaside National Bank*, 135 So.3d 508 (FLA. 5th DCA 2014); *In re McCollam*, 612 So. 2d 572, 573 (Fla. 1993).

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Guide to guardianship changes

by Carolyn Landon

Most of the recent changes to the practice of guardianship came through House Bill 5 and its companion, House Bill 7. Following are the changes to Florida Statutes Sections 744 and 709, in order of appearance:

1. Amends F.S. 744.107 and F.S. 744.1075 to authorize a court to appoint the Office of Criminal Conflict and Civil Regional Counsel as a court monitor for an indigent ward.

2. Amends F.S. 744.108(8) to provide that the court may award attorney's fees and costs associated with proceedings to determine the fees of a guardian or an attorney who has rendered services to a guardian or ward, including court-appointed counsel. It also adds new subsection (9) dispensing with any requirement for expert testimony to support an award of fees unless requested.

3. Amends F.S. 744.3025(1)(a) to provide that the court may appoint a guardian ad litem only "if the court believes that a guardian ad litem is necessary to protect the minor's interest."

4. Amends F.S. 744.3031 to require that notice of the filing of a petition for appointment of an emergency temporary guardian and any hearing thereon be served on an alleged incapacitated person, and the alleged incapacitated person's attorney, at least 24 hours prior to commencement of the hearing unless the petitioner can demonstrate that substantial harm to the alleged incapacitated person would occur if notice was given.

5. Amends F.S. 744.309 to provide that a for-profit corporate guardian existing under the laws of this state is qualified to act as guardian of a ward if the entity meets certain requirements.

6. Amends F.S. 744.3115 and F.S. 744.345 to provide that the court must specify in any order appointing a guardian of the person and in all letters of guardianship what authority the guardian may exercise with regard to the ward's health care decisions versus what authority, if any, a health care surrogate previously designated by the ward may continue to exercise.

7. Amends F.S. 744.312 to require that a court consider the wishes of the next of kin of the alleged incapacitated person if he or she cannot express a preference concerning who should be appointed permanent guardian. A court is also prohibited from giving the emergency temporary guardian preference in the appointment of a permanent guardian. A court that does not utilize a rotation system for the appointment of a professional guardian in a particular matter must make specific findings of fact regarding why the guardian was selected by the court. It also prohibits a professional guardian from being appointed as the permanent guardian of a ward if the professional guardian served as the emergency temporary guardian of the ward unless the ward or the ward's next of kin requests the appointment. The court may waive the restriction by specific written findings of fact if the special requirements of the guardianship demand that the court appoint a guardian because he or she has special skills, talent or experience.

8. Amends F.S. 709.2109 to provide that if proceedings are initiated to determine the principal's incapacity or for the appointment of a guardian advocate, the power of an agent under a power of attorney is not automatically suspended if the agent is the parent, spouse, child or grandchild of the principal ("relative agent"). The power of such agents to act on behalf of the principal may only be suspended by the court pursuant to a request by verified motion.

9. Creates F.S. 744.3203, which specifies the motion procedure to suspend the authority of a relative agent. The motion may be filed at any time during proceeding to determine incapacity but must be filed before the entry of an order determining incapacity. The plain language of the bill suspends the power of a relative agent upon the filing of the motion.

10. Amends F.S. 744.331(6) to require that a court consider the incapacitated person's unique needs and abilities when determining what rights should be removed in a guardianship proceeding.

11. Amends F.S. 744.331(7)(c) to provide that if the petition is dismissed or denied, the fees of the examining committee are paid upon court order as "expert witness" fees under F.S. 29.004(6). This implements the provisions of 29.004(6), which awards fees to court-appointed experts generally and provides a source of funding to ensure that the members of the examining committee are reasonably compensated as contemplated by F.S. 744.331 without incentive to find incapacity. Also provides that where the petitioner was found to have filed a petition in bad faith and the state has paid the members of the examining committee, the petitioner must reimburse the state for fees paid.

12. Amends F.S. 744.344(4) to allow for the appointment of an emergency temporary guardian if a petition for appointment of a guardian has not been ruled upon at the time of the hearing on the petition to determine incapacity.

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13. Creates F.S. 744.359, which provides that a guardian may not abuse, neglect or exploit a ward under the guardian's care. Any person believing that a guardian is abusing, neglecting or exploiting a ward must report the incident to the central abuse hotline of Florida Department of Children and Families. Courts are directed to interpret F.S. 744.359 in conformance with F.S. 825.103, which creates criminal penalties related to the exploitation of an elderly person or disabled adult.

14. Amends F.S. 744.361 to impose additional statutory duties upon a guardian as fiduciary and creates duties specific to the guardian of the person. Further, it amends F.S. 744.361(1) to confirm and codify pre-existing Florida law that a guardian is a fiduciary with respect to a ward under the guardian's care.

15. Amends 744.367 to revise when a guardian of the person must file an annual guardianship plan. The bill also amends F.S. 744.369 to provide that a guardian may continue to act under a previous year's annual guardianship plan until the next year's annual guardianship plan has been approved by the court unless otherwise ordered by the court.

16. Amends F.S. 744.464 to establish a "preponderance of the evidence" burden of proof for the restoration of an incapacitated person's rights. It also requires that a court give priority to any suggestion of capacity and advance such cause on the judicial calendar.

17.House Bill 7 amends F.S. 744.3701 and creates a public records exemption for proceedings involving settling claims of minors.

***Carolyn Landon, BCS**, is a Florida Bar board certified elder law attorney practicing in West Palm Beach, Florida. She is co-chair of the Guardianship Committee of the Elder Law Section. She served on the Elder Law Certification Committee from 2008 until 2014, and she is a past chair of that committee.*

SECTION NEWS

Mark your calendar!

January 14, 2016
Essentials of Elder Law
Loews Portofino, Orlando

January 14, 2016
ELS Executive Council Meeting
Loews Portofino, Orlando

January 15-16, 2016
ELS Annual Update
Loews Portofino, Orlando

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

June 15-18, 2016
The Florida Bar Annual Convention
Hilton Bonnet Creek, Orlando

June 17, 2016 • 9-11 a.m.
ELS Committee Training
Hilton Bonnet Creek, Orlando

June 17, 2016 • 12 noon-2 p.m.
ELS Executive Council Award Luncheon
Hilton Bonnet Creek, Orlando

June 17, 2016 • 2-4 p.m.
ELS Executive Council Meeting
Hilton Bonnet Creek, Orlando

The Florida Bar Continuing Legal Education Committee and
the Elder Law Section present

Wi-Fi in Meeting Room!

Express ride access at Universal!

Loews Portofino Bay Hotel, Orlando

Essentials of Elder Law (#2019R)

~ LIVE PRESENTATION AND WEBCAST ~

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

JANUARY 14, 2016

COURSE NO. 2019R

Elder Law Annual Update and Hot Topics (2021R)

~ LIVE PRESENTATION ~

COURSE CLASSIFICATION: ADVANCED LEVEL

JANUARY 15-16, 2016

COURSE NO. 2021R

Due to popular request, this annual event has been extended to three days. An extra day has been added for "Elder Law Essentials for New Attorneys and Paralegals." The second and third days are for the "Annual Update" which will encompass more advanced topics and issues. A complete list of presentations can be found in this brochure.
To register online visit: www.Eldersection.org.

LOEWS PORTOFINO BAY HOTEL

Nestled along a picturesque bay at Universal Orlando® Resort, this luxurious hotel recreates the charm and romance of the famed seaside village of Portofino, Italy, right down to the cobblestone streets and outdoor cafes. Guests enjoy impeccable and attentive service, the opulent Mandara Spa®, three themed swimming pools and eight restaurants and lounges. From the classically-inspired fountains and charming courtyards to the authentic music filling the piazza, Loews Portofino Bay Hotel enables guests to escape to the sunny shores of the Italian Riviera. Plus, as a deluxe on-site hotel guest you'll stay in the heart of the excitement at Universal Orlando Resort® and receive exclusive theme park benefits you won't receive staying anywhere else including: Universal Express℠ unlimited ride access allowing you to SKIP THE REGULAR LINES in both theme parks all day — a FREE benefit worth up to $89 per person, per day (valid theme park admission required) AND early park admission to Universal's Islands of Adventure®, one hour before the theme park opens (valid theme park admission required).

SCHEDULE – DAY 1

Essentials of Elder Law

COURSE CLASSIFICATION:
INTERMEDIATE LEVEL

Live Presentation and Webcast:
Thursday, January 14, 2016

Course No. 2019R

7:50 a.m. – 8:15 a.m.	**Registration (Breakfast on your own)**
8:15 a.m. – 8:20 a.m.	**Welcome and Announcements** *Ellen Morris, Boca Raton*
8:20 a.m. – 9:10 a.m.	**Guardianship** *Richard Millstein, Miami*
9:10 a.m. – 9:50 a.m.	**"How's Business UNBELIEVABLE!"** *Jennifer Campbell Goddard, Olathe, KS*
9:50 a.m. – 10:40 p.m.	**Pre Mortem Legal Planning** *Howie Krooks, Boca Raton*
10:40 a.m. – 10:55 a.m.	**Break**
10:55 a.m. – 11:35 p.m.	**Residents Rights, Housing** *Ailish O'Connor, Jacksonville*
11:35 a.m. – 12:15 p.m.	**Medicare** *Ailish O'Connor*
12:15 pm. – 1:30 p.m.	**Lunch (included in registration)**
1:30 p.m. – 2:20 p.m.	**Medicaid** *Randy Bryan, Oviedo*
2:20 p.m. – 2:50 p.m.	**Advance Directives** *Scott Solkoff, Delray Beach*
2:50 p.m. – 3:40 p.m.	**Essentials of Special Needs Trust** *Steve Hitchcock, Clearwater*
3:40 p.m. – 3:55 p.m.	**Break**
3:55 p.m. – 4:45 p.m.	**VA Benefits** *Valerie Peterson, Huntington Beach, CA*
4:45 p.m. – 5:15 p.m.	**Elder Smart** *Jana McConnaughhay, Tallahassee*

SCHEDULE – DAYS 2 & 3

Elder Law Annual Update and Hot Topics

COURSE CLASSIFICATION: ADVANCED LEVEL

Live Presentation: Friday and Saturday, January 15 – 16, 2016

Course No. 2021R

The Elder Law Annual Update and Review Course will cover hot topics within each topic of interest to an advanced Elder Law practitioner. Recent case law and statutory changes will be discussed, as will strategies for dealing with these changes successfully. Attendees will leave with a higher level of expertise and an enhanced ability to meet clients' needs. For attorneys preparing to take the Elder Law Board Certification exam, the course includes special components designed to provide invaluable tips and assistance in preparing for the exam.

FRIDAY, JANUARY 15TH

(Breakfast on your own)

7:40 a.m. – 8:00 a.m.
Registration

8:00 a.m. – 8:10 a.m.
Welcome and Announcements
Ellen Morris, Boca Raton

8:10 a.m. – 9:00 a.m.
Advanced Exploitation & Abuse
Carolyn Sawyer, Orlando

9:00 a.m. – 9:30 a.m.
POLST
Charlie Robinson, Clearwater

9:30 a.m. – 10:20 a.m.
Ethics
Ken Goodman,

10:20 a.m. – 10:35 a.m.
Break

10:35 a.m. – 11:25 a.m.
Advanced Probate Issues
Twyla Sketchley, Tallahassee

11:25 a.m. – 12:15 p.m.
Advanced issues In Medicare, Housing and Residents Rights
Ailish O'Connor

12:15 p.m. – 1:30 p.m.
Lunch (Included in Registration)
Task Force Updates
Ellen Morris, Boca Raton and Sam Boone, Gainesville

1:30 p.m. – 2:20 p.m.
Advanced Medicaid
Randy Bryan, Oviedo

2:20 p.m. - 3:10 p.m.
Advanced Special Needs Trust
Steve Hitchcock, Clearwater

3:10 p.m. – 3:25 p.m.
Break

3:25 p.m. – 4:15 p.m.
Advanced VA Benefits
Valerie Peterson, Huntington Beach, CA

4:15 p.m. – 5:05 p.m.
Long Term Care Insurance and Annuities
Leonard Mondschein, Miami and Jill Ginsberg, Ft. Lauderdale

SATURDAY, JANUARY 16TH

(Breakfast on your own)

7:30 a.m. – 8:00 a.m.
Registration

8:00 a.m. – 8:10 a.m.
Welcome and Announcements
Ellen Morris, Boca Raton

8:10 a.m. – 9:00 a.m.
Social Security
Steve Hitchcock, Clearwater

9:00 a.m. – 9:50 a.m.
Case Law Update
Juan Antunez, Miami

9:50 a.m. – 10:15 a.m.
Break

10:15 a.m. – 11:05 a.m.
Administrative Advocacy
Linda Chamberlain, Clearwater

11:05 a.m. – 11:55 a.m.
Tax Issues: Income, Irrevocable Trusts etc.
Stuart Morris, Boca Raton

11:55 a.m. – 1:10 p.m.
Lunch

1:10 p.m. – 2:00 p.m.
Litigation involving Medicaid Planners and UPL
Sheila Biehl, Stuart

2:00 p.m. – 2:40 p.m.
Stock Broker Litigation
David Weintraub, Plantation and Scott Link, West Palm Beach

2:40 p.m. – 3:30 p.m.
Certification Boot Camp
Collett Small, Pembroke Pines, Debra Slater, Coral Springs and Jason Waddell, Pensacola

CLE CREDITS

CLER PROGRAM	CERTIFICATION PROGRAM
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REGISTRATION

Essentials of Elder Law ~ and ~ Elder Law Annual Update and Hot Topics

ONE LOCATION: (369) LOEWS PORTOFINO BAY HOTEL, ORLANDO (JANUARY 14-16, 2016)

TO REGISTER OR ORDER AUDIO CD OR COURSE BOOKS BY MAIL, SEND THIS FORM TO: The Florida Bar, Order Entry Department, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON-SITE REGISTRATION, ADD $25.00. **On-site registration is by check only.**

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REGISTRATION FEE (CHECK ONE):	"Essentials" (Jan. 14 only) Course #2019	"Update & Hot Topics" (2 days - Jan. 15 & 16) Course #2021	"Essentials" #2019 and "Update & Hot Topics" #2021
Member of the Elder Law Section	❑ $245 – Live	❑ $435	❑ $645
Non-section member	❑ $295 – Live	❑ $485	❑ $745
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Paralegal (Not eligible for online registration)	❑ $185	❑ $305	
Persons attending under the policy of fee waivers	❑ $75	❑ $125	

WEBCAST REGISTRATION: Section Member $295 - Non Section Member $345 - To Register for the Essentials of Elder Law Webcast go online to: http://tinyurl.com/FloridaBarCLE2019R.

Members of The Florida Bar who are Supreme Court, Federal, DCA, circuit judges, county judges, magistrates, judges of compensation claims, full-time administrative law judges, and court appointed hearing officers, or full-time legal aid attorneys for programs directly related to their client practice are eligible upon written request and personal use only, complimentary admission to any live CLE Committee sponsored course. Not applicable to webcast. (We reserve the right to verify employment.)

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❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

❑ Enclosed is my separate check in the amount of $50 to join the Elder Law Section. Membership expires June 30, 2016.

Attorney Linda R. Chamberlain joins Special Needs Lawyers PA


Linda Chamberlain

Special Needs Lawyers PA has strengthened its expanding elder law practice in Clearwater with the arrival of attorney Linda R. Chamberlain. Linda was previously with Florida Elder Lawyers PLLC and Linda R. Chamberlain PA.

Linda Chamberlain is a board certified elder law attorney who has practiced in Clearwater and the surrounding area, including Dunedin, Palm Harbor, Largo, Seminole and St. Petersburg, since 1991. Her practice includes Medicaid planning, Medicaid applications, long-term care and disability issues, qualified income trusts, special needs trusts and estate planning.

Linda has built an outstanding reputation, and her peers have recognized her for her professionalism and ethics with the AV Preeminent Peer Review Rating by Martindale-Hubbell, the highest award in the legal industry. Linda is a past chair of the Elder Law Section of The Florida Bar and remains an active member. She served on the Executive Committee of the Elder Law Section from 2003 to 2010. She served on The Florida Bar BLSE Elder Law Certification Exam Committee from 2005 to 2009. In addition to practicing law, she founded two businesses, Aging Wisely LLC and EasyLiving Inc., to benefit the elderly in her community. She serves on the board of the Clearwater Free Clinic and has written numerous articles for publication on elder care issues.

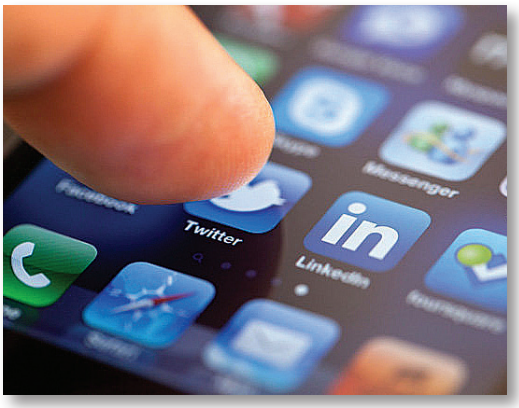
Linda received the B.A. in social work from Oral Roberts University and the J.D. from the University of Cincinnati College of Law. In 1998 she was selected as a Leading Florida Attorney in the area of trusts and estates. Linda is a 1997 graduate of Leadership Pinellas, is a 1988 recipient of the University of Cincinnati College of Law Merit Scholarship and in 1989 was named in Who's Who Among American Law Students.

Special Needs Lawyers PA is an elder law practice focusing on developmental disability assistance, guardianship, elder law, estate planning, probate, Medicaid benefits, special needs trusts and veterans benefits.

Four ways practice management apps can start your 2016 off right

by Audrey J. Ehrhardt

The end of the year signals that it's time for us to start evaluating the performance of our practices over the past 12 months. This is also the time of year for us to start looking ahead to set the goals we want to achieve in our firms going forward. When you begin to set those goals, you may find yourself asking a series of questions such as: How can I get the most out of my work day? What's the best way to protect my time? Will I reach my growth and profitability goals? What tools do I need to be more productive?



Let's look at four ways practice management apps can make 2016 your best year yet.

#1: Effectively manage expectations

Just because you're working late into the night doesn't necessarily mean you want to set the expectation with your practice team, your clients or your referral network that you're available for communication 24/7/365. While you need to be able to write responses or assign projects at a time that works best for you, it doesn't mean your responses need to be delivered instantaneously. Instead, think about how you want to communicate. Is it the next business day? 36 hours? Does it depend on the recipient? Once you decide, try using an app like Boomerang, FollowUpThen or Nudgemail to control, schedule and deliver your email.

#2: Control the paper in your firm

Ever find yourself buried in a mountain of tiny receipts, trying to read faded paper that you need to account for? What about trying to carrying files full of paper documents? Is your wallet or your briefcase filled to the brim with business cards you need to manage? Your smartphone can be equipped with apps to drastically reduce the amount of paper in your practice. Take a look at Expensify, Harvest or Tallie for managing your and your team's receipts and expenses. CamScanner, Genius Scan and Office Lens turn document scans into pdfs. Want an all-in-one? Try Evernote; it can scan documents, record business cards and capture images of receipts.

#3: Get work done

This is probably your number one priority most days of the week, but how long can you really go in your firm before you're interrupted? While you can provide instructions to your team to limit those interruptions, can you do the same thing for yourself? Chances are many of those interruptions come directly from your smartphone or tablet. To minimize your distractions during dedicated work time, try going dark on your devices. While your smartphone may have a timed do-not-disturb feature you can program, you may also want to try Trigger, Agent or Call Bliss. Don't worry, most of these apps still allow a built-in break-through feature for important numbers like family to get through.

#4: Work anywhere

I don't want to tell you I'm writing this from the Chicago airport, but I will. It's because everything I need to run my business is available on my tablet. The integration of my cloud storage and database accounts (think Dropbox, Google Drive and Insightly) together with a virtual office environment and project management software (such as Basecamp or Podio) enable me to create from anywhere. When I need to work with my team, I can chat with them inside my project management software. If we need to collaborate on a document, we can share a screen (join.me or Skype) or pull up the document to edit simultaneously. Right now, I'm writing this in Word on my iPad using my Microsoft 365 subscription. My next step will be to save it to my cloud file (Box or OneDrive), and then I'll assign it for proofreading (Basecamp).

I'll take a minute to acknowledge that not all apps work on all devices or are able to communicate across all of your workspaces. Not all of them are free, either. The key is to determine what you need to make your firm's administrative ecosystem work for you. Play around with the apps that are available to you, using free trial periods when you can, and get your firm where it needs to be so you can focus on greater success in 2016!

***Audrey J. Ehrhardt, J.D.**, builds successful law firms and corporations across the country. A former Florida elder law attorney, she is the founder of practice42, llc, a strategic development firm for attorneys. She focuses her time creating solutions in the four major areas of practice development: business strategy, marketing today, building team and the administrative ecosystem. Join the conversation at **www.practice42.com**.*

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YLD

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Guardianship Committee
Carolyn Landon and Victoria Heuler, co-chairs

Due to the early start of the 2016 Legislative Session, the Guardianship Committee has been meeting by telephone at 12 noon on the second and fourth Wednesdays of every month. Session begins on Jan. 12, 2016, and is scheduled to adjourn on March 11.

We began this "pre-legislative" session reviewing Senator Nancy Detert's proposed Senate Bill 232. This bill proposes to rename the Statewide Public Guardianship Office to the Office of Public and Professional Guardians; revises the duties and responsibilities of the executive director for the Office of Public and Professional Guardians; and provides that a guardian has standing to seek judicial review if his or her registration is denied. We will continue to follow this bill for any changes.

If you are interested in joining the Guardianship Committee, please email Victoria Heuler at *victoria@hwelderlaw.com* or Carolyn Landon at *carolyn@landonlaw.net*.

Estate planning for Medicaid planners

The tale: Your client comes into your office steaming mad. Her mother paid an elder law planner a lot of money to get her father qualified for Medicaid. Dad had been in the nursing home for two years when Mom suddenly and unexpectedly died of a heart attack. Not only did Mom's last will and testament leave everything to Dad, but Dad was still listed as the beneficiary on Mom's accounts. Dad no longer meets the qualifications for Medicaid because he inherited Mom's $200,000 brokerage account. Your client wants to sue this planner for malpractice, and she may very well have a case.

The tip: When putting together a Medicaid plan for a married couple, you ignore their estate plan at your peril. As the planner, you must think through arranging the assets in such a way that the institutionalized spouse (the IS) qualifies for Medicaid. You also must think further as to what happens when one of the spouses dies.

The first and most obvious thing to do is to review the estate plan. Most married couples' estate plans leave all the assets to the surviving spouse. If the community spouse is the first spouse to die, leaving everything to a spouse who needs nursing home care or who is actually residing in a nursing home, this will be a disqualifying event for Medicaid purposes. Clients often react to this news by deciding to leave everything to the children and disinherit the IS. But even if your client leaves nothing to his or her spouse, Florida law allows a disinherited spouse to claim 30 percent. This is known as the elective share. The Department of Children and Families, which administers the Medicaid program in Florida, may require an institutionalized spouse to claim the elective share.

Most well spouses do not want to disinherit their sick spouse. Additionally, Medicaid does not pay for everything an institutionalized spouse might need. You can and should set up your client's estate plan so that the IS and the assets are protected should the well spouse die first. This can be accomplished by having the well spouse's estate plan create a special needs trust for the benefit of the IS. You must be mindful, however, of 42 USC 1396p(d)(2)(A), which makes this type of trust countable for Medicaid if it is established by a spouse *unless it is established by will*.

Tips & Tales

by Kara Evans

So, you advise your client to create a last will and testament wherein the beneficiary is a special needs trust that benefits the IS. The client must then ensure that all assets are titled in the well spouse's name alone, ensuring that all assets go through the will (and of course through probate) to the trust for the IS. But our clients are programed to want a revocable trust that avoids probate. The answer is to set up what can be called a reverse pour over trust. This satisfies your client's desire to avoid probate to the extent possible, allows the assets to be titled in a revocable trust and ensures the SNT will be properly set up.

The trust will have two residuary clauses. The first details what happens to the assets should the IS survive the well spouse. This clause will direct all of the assets to be paid to the personal representative named in the will to be distributed as the last will and testament directs. This ensures that there is a probate only if the IS survives the well spouse. The second residuary clause details what happens to the assets should the IS have predeceased the well spouse. This clause will distribute the assets directly to the heirs without probate.

These documents will create a properly set up special needs trust that does not count as an asset for Medicaid purposes, and your client will know that your services truly are special.

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

Tax tips for elder lawyers

Michael A. Lampert

Last issue's topic, "Basics of estate and gift tax for non-citizens," was very technical, despite my best efforts. It also covered only one topic. This issue I am back to several smaller topics, ones that I hope will be more easily digested.

Estate tax closing letters and alternatives

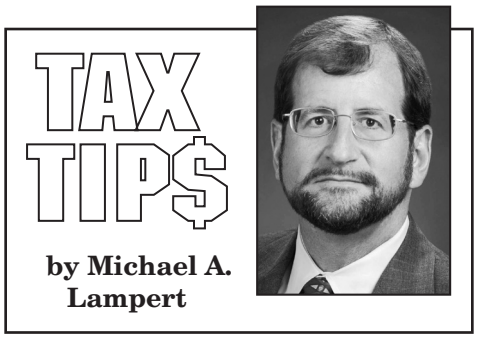
This past year the IRS announced that it will no longer automatically issue estate tax closing letters. Instead, if a closing letter is desired, it can be requested four months *after* filing the return. This new procedure applies to all Form 706s filed on or after June 1, 2015. Note that in some cases for returns filed after Jan. 1, 2015, and before June 1, 2015, a closing letter might not automatically be issued, especially if the return did not meet the filing requirement threshold.

The IRS will issue a transcript of the estate tax return. The transcript will include a code that indicates that the IRS has finished its review of the estate tax return. It is possible that by the time this article is published, the IRS will have updated its website regarding how to obtain these transcripts.

What is not clear is the extent to which title companies, trust companies and other fiduciaries, and even attorneys handling estate administrations, will be comfortable with a transcript rather than a closing letter. It is certainly possible that the "transcript comfort" will increase over time. It is my understanding that this new procedure is in place because it requires less human input to generate a transcript than a formal closing letter. With that said, for the time being, if a closing letter is desired, request one.

Watch the usefulness of the charitable deduction in estate planning and administration

With the increase in the federal estate tax exemption amount, the vast majority of estates are not able to benefit from the estate tax charitable deduction. In most cases, the estate is not large enough to benefit from the deduction.



When doing estate planning for a client with charitable intentions but a non-taxable estate, consider discussing alternatives with the client. For example, instead of having the will or revocable trust make the charitable gift, perhaps have a remainder beneficiary, such as a child, receive the amount and make the charitable gift in the client's "honor." The charitable donor is the non-charitable estate beneficiary (e.g., the client's child). That beneficiary may well be able to use the charitable deduction on his or her own income tax return. Of course, this will only work when there is confidence that the charitable gift will ultimately be made.

Likewise, when administering an estate, it is not uncommon for the estate to donate to charity various items of tangible personal property, often as a way to dispose of unwanted items. Unfortunately, at best the estate ends up as the donor and the charitable deduction for the donation is usually wasted. Instead, if the tangible personal property is "distributed" to a non-charitable beneficiary, such as a child, and the child donates the unwanted items of tangible personal property to charity, the child will have the income tax deduction. Of course, in all cases be sure to meet the substantiation, contemporaneous acknowledgment and other charitable donation requirements.

Disclaimer to a shelter trust—some tips and traps

With the significant increases in the estate tax exemption amount ($5.45 million in 2016), "credit shelter" trusts are being used less and less. With that said, the shelter trust still has value in some situations. Increasingly we are seeing an effort to create flexibility regarding shelter trusts in a married couple's estate plan through the use of a marital outright (or to a Qtip) with a disclaimer to a "credit shelter" trust. This planning allows the decision of whether to use the shelter trust to be made after the death of the first spouse.

There are some traps and procedures that need to be taken into account to properly use this drafting flexibility. While the rules are a bit more flexible regarding the ability of a surviving spouse to benefit from disclaimed assets (allowing income distributions and an ascertainable standards invasion power under I.R.C. 2518(b)(4)), the rules need to be carefully followed.

A. The disclaimer needs to be made within nine months of the first spouse's death. I.R.R. 25.2518-3(c).

B. Disclaimers of specific assets by a fractional or a pecuniary (dollar) amount are allowed. I.R.R. 28.2518-3(c).

C. Make sure that the disclaimer is properly delivered. I.R.R. 25.2518-2(b)(2). (Note that a review of Florida law on disclaimers is beyond the scope of this article.)

Trap #1

If the disclaimer is not timely made, the ability to disclaim is lost.

Tip #1

Consider putting on your checklist

notifying the surviving spouse client about disclaimers and the rules, as applicable.

Trap #2

If the surviving spouse accepts benefit from the property prior to making the disclaimer, the ability to disclaim those assets is lost. Accepting benefits for this purpose can include receipt of interest, dividends, etc. I.R.R. 25.2518-2(d)(1). The regulations do allow residing in the residence.

Tip #2

After telling a client the "disclaimer rules," clients sometimes are afraid to sell assets of the decedent. Sale of assets prior to a disclaimer is acceptable provided the surviving spouse does not receive the assets or proceeds prior to disclaimer.

drafting the shelter trust, "5 and 5" powers as well as the surviving spouse being allowed to invade the shelter trust for an ascertainable standard (health, education, support and maintenance) are allowed. I.R.R. 25.2518-2(e).

Trap #3

Do not give the surviving spouse a limited (or general) power of appointment over the assets in the shelter trust. A limited (or general) power of appointment is not one of the benefits allowed to a surviving spouse under the special spousal disclaimer rules. I.R.R. 25.2518-2(e).

***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.*

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- Citations should be consistent with the Uniform System of Citation. Endnotes must be concise and placed at the end of the article. Excessive endnotes are discouraged.
- Lead articles may not be longer than 12 pages, including endnotes.

Review is usually completed in six weeks.

Summary of selected case law

by Diane Zuckerman

Disputed temporary possession of real property/evidentiary hearing

Georges M. Delbrouck, an individual, Appellant, v. Maria Eberling, as Personal Representative of the Estate of Leon G. Delbrouk, Aime Guy Delbrouk and Claude Delbrouck, Appellees, Case No. 4D15-135 (4th DCA, Oct. 2015)

This case involves the interpretation of Florida Statutes § 733.607(1) with respect to the surrender of real property. The pertinent statute reads in part:

> Except as otherwise provided by a decedent's Will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except the protected homestead, but any real property or tangible personal property may be left with, or surrendered to, the person presumptively entitled to it unless possession of the property by the personal representative will be necessary for purposes of administration. The request by a personal representative will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by a beneficiary is conclusive evidence that the possession of the property by the personal representative is necessary for the purposes of administration, in any action against the beneficiary for possession of it. The personal representative shall take all steps reasonably necessary for the management, protection, and preservation of the estate until distribution and may maintain an action to recover possession of property or to determine the title to it.

The decedent left his property equally to his three sons. One parcel of land contained an automotive business that one son (the appellant) and the decedent had at one time operated together. The appellant continued to run the business after the decedent retired, and was doing so at the time of the decedent's death. The personal representative moved to have the appellant surrender this real property (and other parcels) to her. The appellant countered with a request to continue to occupy the property. The appellant asked for a stay pending his appeal, which was denied, and he was ordered to turn over possession of all real property titled in the decedent's name. The appeal followed.

In interpreting the statute, the court held that when possession of property is in dispute, an evidentiary hearing should be held. The take-home message for those representing clients in a case where possession of real property is disputed is to prepare quickly, with investigation and witnesses for an evidentiary hearing, once the dispute becomes known.

Settlement agreements are binding

Sam Sugar, M.D., et al, Appellants, v. In Re: Estate of Idelle Stern, Appellees, Case No. 3D14-1433, (3rd DCA, September 2015)

The facts of this case arose out of an action brought by the guardian of Idelle Stern, who sued one of children and her spouse (the Sugars) alleging prior mismanagement of the ward's funds. The ward also had three other children (appellees). The parties presented a settlement agreement to the court, which was approved (referred to by the court as the "February 2011" settlement agreement).

In July 2011, the guardian sued the appellees (the three other sisters), alleging that they, too, had misappropriated funds. On July 18, 2011, a long settlement conference was held, in which the Sugars also participated. A global settlement was reached intending to resolve all pending issues. Included in the agreement was language stating that all pending matters were dismissed with prejudice (referred to by the court as the "July 2011" settlement agreement). One of the provisions included an agreed reduction in the ultimate inheritance by daughter Judy Sugar.

In November 2011, the parties, although disputed, discovered the ward had a bank account in Israel, in which the ward had transferred $350,000 to the Sugars in 2005. When the ward died, the appellees moved to enforce the settlement agreement in the estate action, requesting that the Sugars return those funds to the estate. The Sugars countered by arguing that the existence of the Israeli account was known at the time of the "July 2011" settlement agreement. The trial court ordered the Sugars to disgorge the monies received in 2005 prior to the settlement agreement.

The Third District concluded that the releases contained in the settlement agreement barred the appellees from re-litigating issues that occurred in 2005. The court held that any claims were subsumed in the settlement agreement and the releases contained therein.

The practice tip here is to have a heightened sense of awareness if a client comes to you with a dispute that has already been addressed in a settlement agreement. Settlement agreements are contractual in nature, and the courts generally give preference to seeing that they are upheld.

Notice defects can bite

Joann Harrell and Barbara Dake, Appellants, v. Charles A. Badger, as Trustee of the Rita M. Wilson, aka Rita D. Wilson Testamentary Trust, Case Nos. 5D14-1145, 5D14-3469 (5th District June 2015)

A grantor created a trust to benefit her son. The trust provided that if her son predeceased her, the remaining trust proceeds would be distributed to the appellants. The acting trustee sought to sell the grantor's home, which was the only asset remaining in the trust.

The trustee retained counsel to have the trust decanted and transferred to a special needs pooled trust. The pooled trust agreement provided for the creation of a sub-account, with the lawyer as trustee and the son as beneficiary. The house was sold, and the proceeds were placed in the pooled trust. The pooled trust agreement provided that after the beneficiary's death, the remainder would go to other participants in the pooled trust, not to the contingent beneficiaries in the original trust.

The trustee failed to give notice to the qualified beneficiaries of the decanted trust.

Later, the trustee filed a motion to terminate the original trust, and at that time the appellants were first notified on the home sale and decantation. The appellants countered with a breach of fiduciary duty, and sought damages.

The trial court concluded that the terms of the grantor's original trust allowed the trustee to invade the principal of the trust, that he reasonably relied on the advice of counsel and that no breach of his duties had occurred. The trial court terminated the trust and dismissed the claim for damages. Subsequently, the court awarded approximately $85,000 in attorney's fees to the trustee.

On appeal, the Fifth District relied on the language set forth in Florida Statutes § 736.04117, providing for the invasion of principal of one trust (first trust) to appoint in favor of a second trust. The statute provides, however, that the beneficiaries of the first and second trusts must be identical. In addition, paragraph 4 of the statute requires notification to all qualified beneficiaries of the first trust.

Finding that the language was clear and unambiguous regarding notification to qualified beneficiaries, the court determined that the trustee had improperly invaded the trust because he had failed to notify the appellants. In other words, the decantation was invalid. The court also noted that the beneficiaries in the original trust and the pooled trust were not identical. Accordingly, the case was reversed and remanded to the trial court for entry of an order consistent with the Fifth District's opinion.

This case is another reminder of the importance of following notice procedures in trust, probate and guardianship proceedings.

Due process for interested persons in guardianship cases

Lois Zelman, Appellant, v. Martin Zelman, Robert Zelman, individually and as co-guardian of the property of Martin Zelman, Lisa Held, individually and as limited guardian of the person of Martin Zelman and Curtis Rogers, as co-guardian of the property of Martin Zelman, Appellees, Case Nos. 4D14, 4D14-1887 (4th DCA, Sept. 2015)

As is common in second marriages, competing petitions for appointment of guardian were filed by the alleged incapacitated person's wife and son. In the trial court record, there were many accusations of wrongdoing; however, none had bearing on the final outcome. The crux of the reversible error in the trial court hearing involved due process of the wife of the AIP. During the final hearing, the trial judge limited the wife's attorney from asking questions of the witnesses, as well as limited her from calling her own witnesses.

In essence, the appellate court noted that the trial court did not correctly interpret the wife's role as an "interested person" in the proceedings. Citing *Douglas v. Johnson*, 65 So. 3d 605 (Fla. 2nd DCA 2011) for the proposition that due process includes the right to call witnesses and present evidence on their behalf, the court found that the wife's due process was violated during the hearing on the competing petitions for appointment of guardian. In its review of law of standing in guardianship cases, the Fourth District held that a person's standing depends upon whether or not he or she is an "interested person." An interested person is one who under the guardianship statutes is either entitled to notice or has the right to object to petitions. The court concluded that the lack of due process afforded to the wife was fundamental error. Thus, the case was remanded to the trial court for a new hearing consistent with the Fourth District's opinion.

This is an excellent case to reference if the trial court attempts to limit evidence admitted by one interested person over another.

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

Fair Hearings Reported

by Diana Coen Zolner

***Petitioner v. Agency for Health Care Administration*, Appeal No. 10F-00713 (April 2, 2010)**

At issue in this appeal was whether the respondent was correct in reducing home health aide hours from 20 to 10 hours per week due to the services not being medically necessary. The respondent had the burden of proof.

The petitioner was an 84-year-old recipient of Nursing Home Diversion Waiver Program benefits, in the form of home health aide services, since October 2008. At her quarterly review in January 2010, the petitioner's home health aide services were reduced from 20 hours per week to 10 hours per week. The agency reduced her hours based on its determination that the petitioner was able to perform certain functions at home, such as meal preparation, and that she was assisted by her daughter with certain activities of daily living, such as bathing and dressing. The petitioner's daughter was able to come home from work to help the petitioner with meal preparation and shopping. As a result of these findings, the respondent determined that 10 hours of home health aide services were sufficient, with two additional hours for companion care (for socialization purposes). In February 2010, the daughter's husband became ill, and she needed to go back to work full time. As a result, the agency temporarily increased the petitioner's hours to 15 hours per week. The five extra hours were then eliminated in March 2010. At that time, the respondent explained that the petitioner would be better served in an assisted living facility (ALF) or an adult day care, for which the waiver would pay.

The petitioner did not want to leave her home and preferred in-home care. The petitioner's daughter explained that her mother's medical condition was worsening, including her dementia. The daughter also stated that her husband's medical condition was not getting any better, which meant she had to continue to work full time and no longer had the flexibility to come home to help her mother with meal preparation. She also had less time in general to assist her mother. The petitioner and her daughter wanted the additional five hours added back into the petitioner's benefits for a total for 15 hours per week.

The hearing officer analyzed the issue under 42 C.F.R. § 440.230, Sufficiency of amount, duration and scope, which states in part that the agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization of control procedures. Florida Administrative Code 58G-1.010, Definitions, states in part that medical necessity means that the medical care, goods or services must meet the following conditions: 1) be necessary to protect life, to prevent significant illness or significant disability or to alleviate severe pain; 2) be individualized and specific to the patient's illness or injury under treatment, and not in excess of the patient's needs; 3) be consistent with generally accepted medical standards; 4) be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available; and 5) be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's care taker or the provider.

Based on the evidence that the petitioner's condition was worsening and that her daughter's husband was ill, making the daughter less available to assist with the petitioner's care, the hearing officer determined that an immediate reduction of home health aide hours from 20 to 10, a reduction of 50 percent, was too drastic. The petitioner's appeal was granted and the reduction of hours to 15 per week was to stand, pending an evaluation of the new medical evidence concerning the daughter's husband and the daughter's ability to be at home to help the petitioner. The hearing officer also determined that new medical evidence regarding the petitioner's dementia should be evaluated. Despite these findings, the hearing officer noted that the daughter should make every effort to have the petitioner placed in an adult day care or ALF where services would be more readily available.

***Petitioner v. Respondent*, Appeal No. 14N-00081 (June 18, 2014)**

On Mar. 18, 2014, the respondent served the petitioner's son with a nursing home transfer and discharge notice, which informed the petitioner of the facility's intent to discharge the petitioner effective May 18, 2014. The discharge location listed on the notice was the son's home in Minnesota. The reason for this action, as shown on the notice, was "your bill for services at the facility has not been paid after reasonable and appropriate notice to pay." The petitioner timely requested a hearing to challenge the respondent's decision.

The petitioner was 100 years old and became a resident of the facility on May 11, 2009. The petitioner's son made payments to the nursing home

in January, March and May of 2015 totaling approximately $68,991.04 toward services received. On Mar. 20, 2014, the respondent facility mailed the petitioner's son a letter indicating that 1) the petitioner's past due balance as of March 2014 was $77,695.35; 2) the petitioner was billed at the private pay rate because she did not complete the Medicaid application process; and 3) if her outstanding balance was not paid and her account was not kept current, the facility would terminate her residency for non-payment and breach of the residency agreement.

As of Apr. 18, 2014, the petitioner's past due balance remained $77,695.35, and as of June 6, 2014, the past due balance was $99,728.29. The months covered by this overdue balance were December 2012 through June 2014. On Apr. 8, 2014, the petitioner's son completed an application for Institutional Care Program (ICP) benefits on behalf of the petitioner with the Department of Children and Families (DCF). As of the date of the hearing on appeal, the petitioner's application was pending and her ICP benefits had not been approved. The petitioner remained a resident of the nursing facility pending the outcome of the hearing.

The burden of proof is clear and convincing evidence, and the burden was assigned to the respondent. Federal Regulation 42 C.F.R. § 483.12, Admission, transfer and discharge rights, sets forth the limited reasons a Medicaid- or Medicare-certified nursing facility may involuntarily discharge a resident. In summary, the circumstances in which such a facility can involuntarily discharge a patient are as follows: 1) if discharge is necessary for the resident's welfare, and his or her needs cannot be met in the facility; 2) the resident's health has improved sufficiently so that he or she no longer needs the services of the facility, 3) the safety and/or health of the individuals in the facility is endangered; and 4) the resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid. Furthermore, the Department of Health and Human Services, Centers for Medicaid and Medicare Services, State Operations Manuel, Appendix PP - Guidance to Surveyors for Long Term Care Facilities, states in part that: 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 then refuses to pay for his or her stay.

Based on the above guidance, the hearing officer granted the appeal on the basis that the facility must wait until the Medicaid application was disposed of and the petitioner was given adequate notice of any amounts due after any possible reductions as a result of payments from Medicaid. The hearing officer noted that the petitioner's application was still pending, and it was unknown if the benefits would be granted and their effective date. As a result, it was unknown what, if any, monies would still be owed to the facility. Therefore, the facility was required to wait until that determination was made, after which it would be required to give the petitioner an opportunity to pay the resulting balance due.

***Petitioner vs. Florida Department of Children and Families,* Appeal No. 09F-07708 (December 14, 2009)**

The petitioner appealed the respondent's notice of Dec. 7, 2009, to establish and collect a total agency over issuance of $377.48 in Medicaid program benefits from July 2008, September 2008, February 2009 and March 2009. The petitioner authorized an employee of the nursing home to apply for ICP Medicaid benefits on his behalf with an effective date of May 2008. The application was completed and filed on June 12, 2008, and approved on July 15, 2009. In January 2009, DCF sent the petitioner an interim notice to which he responded "no change," and DCF continued his ICP benefits.

In August 2009, the petitioner contacted DCF to advise that he was no longer in the nursing home. DCF reviewed the case and determined that the petitioner had left the nursing home on June 14, 2008 (two days after the application was filed). The matter was then referred to Benefit Recovery, which determined that there was no documentation that the petitioner, the petitioner's representative or the facility reported that the petitioner had left the nursing home. Benefit Recovery further discovered that DCF (the respondent) received a level of care notice regarding the petitioner on July 7, 2008, which notified the respondent that the petitioner had been discharged from the nursing home on June 14, 2008, because he no longer met the criteria for eligibility for ICP Medicaid. Benefit Recovery further determined that the respondent had failed to close timely the petitioner's ICP Medicaid at the end of June 2008, and as a result, the petitioner's ICP Medicaid case incorrectly remained open from July 2008 through August 2009. Based on his income, the only other Medicaid category for which the petitioner qualified was Medically Needy. The petitioner did not submit any other medical bills, however, and the bills he had previously incurred did not exceed his share of costs. Therefore, Benefit Recovery determined that an overpayment of benefits in the amount of $377.48 had occurred.

Florida Statute § 414.14 states in pertinent part that whenever it becomes apparent that any person or provider has received public assistance to which he or she is not entitled, through either simple mistake or fraud on the part of the department, the recipient or the participant, the

continued, next page

department shall take all necessary steps to recover the overpayment. Florida Administrative Code 65A-1.900, Overpayment and Benefit Recovery, defines the administrative policies applicable to the establishment and recovery of overpayment in the public assistance programs, and it states, in pertinent part, that overpayments shall be recovered from the participant. In this case, the hearing officer determined that the participant was the petitioner, and that even though the error was an agency error, the rules indicate that the individual responsible for repayment of the overpayment is the petitioner.

***Petitioner vs. Florida Department of Children and Families*, Appeal No. 09F-06393 (January 26, 2010)**

The petitioner appealed DCF's actions to deny his application for ICP Medicaid benefits based on the contention that he was not disabled. The petitioner had the burden of proof.

The petitioner was 52 years old when he was admitted from the hospital into a health and rehabilitation center in Gainesville, Florida. As the petitioner was under 65 years old, he did not meet the age criteria for Medicaid. For an individual less than 65 years of age to receive benefits, he or she must meet the disability criteria under Title XVI of the Social Security Act appearing in 20 C.F.R. § 416.905. Therefore, a disability assessment was required. The department's District Medical Review Team (DMRT) completed an assessment of the petitioner's disability claim and determined the petitioner's condition was not expected to last for a period of at least 12 consecutive months. As a result, DMRT determined that the petitioner did not meet the Medicaid disability requirement, and his application for ICP Medicaid benefits was denied.

The petitioner applied for Social Security Disability benefits based on his disability claim. At the time of the hearing, his Social Security Disability application was pending. Title XVI of the Social Security Act states that a determination of eligibility for SSI payments based on a disability determination made by the Social Security Administration (SSA) automatically confers Medicaid eligibility. Subsequent to the hearing, the petitioner received a letter from the SSA approving his disability application. As a result, the hearing officer determined that the petitioner met the disability requirement for ICP Medicaid because the SSA had determined that he was disabled. Therefore, DCF's action to deny ICP Medicaid benefits was reversed, and the department was ordered to determine the petitioner's eligibility based on all other factors of ICP Medicaid eligibility.

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, Florida.*

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