The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Inside:

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- *Guarantee provisions in ALF contracts: A trap for residents' family members*
- *Total and permanent disability discharge of student loans*
- *Protecting your online brand*
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The Elder Law Advocate will be glad to run corrections the issue following the error.

COVER ART

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www.randytraynorphotography.com

12/2014

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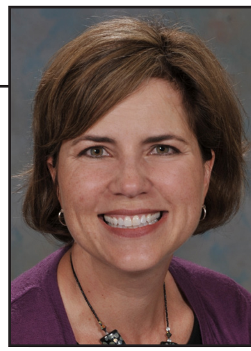
The deadline for the SPRING 2015 EDITION is March 1, 2015. Articles on any topic of interest to the practice of elder law should be submitted via email as an attachment in MS Word format to Stephanie M. Villavicencio at *svillavicencio@zhlaw.net*, or call Arlee Colman at 800/342-8060, ext. 5625, for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

Who we are

The Elder Law Section, in conjunction with the Academy of Elder Law Attorneys and a public relations specialist, is embarking on an effort in the next several months to educate core groups about the unique attributes of an elder law practice and elder law attorneys. Each of you, as members of the section, will be equipped with tools you can take to your communities to communicate these messages. Your Executive Council hopes that these efforts will elevate both our practice area as a whole and our members' individual practices.

On the heels of the section's annual retreat and a very successful litigation CLE, and on the cusp of these public relations efforts, I pondered what our messages to the greater community might be. Although our core messaging will be crafted collaboratively, as your chair I think those outside of our section should know the following about our members:

1. **Elder law attorneys are excellent advocates.** As section members **Enrique Zamora, Louis M. Hillman Walker, Alex Cuello, Ellen Morris, Shannon Miller, Gerald Hemness, Victoria Heuler** and **Babette Bach** made clear at our recent CLE (The Elder Law Litigator: Lover and Fighter), elder law attorneys are experts at advocating for their clients. Our members can be advocates in an office-based transactional practice, or in a courtroom when necessary. We fight for our clients and their interests, even when capacity might be waning, always mindful of our ethical constraints.
2. **Elder law attorneys have a wide breadth of knowledge.** One of the truly unique aspects of elder law practice is the need to be conversant and knowledgeable in several areas of the law at any given time. Our services to our clients are not limited simply to creating documents and sending clients on their collective ways. We know about public benefits, whether those benefits are available through Medicaid, the VA or other sources. We know estate planning, guardianship and special needs trusts; we can identify tax issues or review a long-term care insurance policy with an eye toward truly helpful provisions. Need some oversight at home? The good elder law attorney can identify service providers in the client's geographical area. Elder law attorneys weave all of this knowledge together to come up with the best possible planning for their clients.
3. **Elder Law attorneys are engaged.** It was a great pleasure to hear **Shannon Miller** speak at our recent CLE on the exploitation bill she worked to develop with many other experts from around the state. As a prominent elder law attorney, Shannon had a seat at the table when work began on proposed statutory changes. Our members are currently engaged in statewide efforts on guardianship and Medicaid ACCESS discussions. We work with the Department of Elder Affairs and the Agency for Health Care Administration on a regular basis. A Public Policy Task Force made up of elder law leaders meets on a weekly basis to work on issues of interest to our members, without remuneration, and many times without acknowledgment. We deal directly with the issues that directly affect our clients because we care about making their lives, and the laws and rules that affect them, better than when we started.
4. **Elder law attorneys are incredibly nice people.** If you spent any time at our recent CLE or the events that surrounded it, you confirmed that the members of our section are kind and welcoming people. They are the type of people you would want representing your own family members. They embrace new members and are generous with their knowledge and work. Examples of this generosity are everywhere. One attorney newer to the practice shared with me that board certified attorney **Jack Rosencranz** allowed him to shadow for two full business days, simply because he asked. When I asked Jack about it, he told me that **Julie Osterhout** did the same for him many years before, and he felt like he was just paying that good deed forward. Or if you are on the AFELA listserv, you might have seen **Pamela Burdick**'s story about **Elaine Schwartz**, who copied the entire ESS Policy Manual and had it delivered, without being asked, when Pamela was in a pinch and could not access the manual online. Elaine says she does not even remember doing it; Pamela says it's something she will never forget. I personally am grateful for the kindness of **Ellen Morris**, who drove me all over Orlando in June when I broke my foot right before our Elder Law Section Executive Council meeting. She then helped me get excited about our Boca retreat and gave all kinds of personal recommendations, which made it the very special event it turned out to be.



Jana McConnaughhay

Message from the chair

Which leads me to ...

5. **Elder law attorneys are a whole lot of fun.** What happens in Boca stays in Boca, but I will say that our Friday night retreat activities were memorable, as were the receptions on Thursday and Friday and a bike to brunch on Saturday morning. We deal with serious subjects and lots of emotions in our work; it is awfully nice to relax and enjoy ourselves with colleagues who understand what our workdays entail. If you haven't already, join us for future events. It's therapeutic and allows us all to rev back up to get our smart, engaged, kind selves back to practicing the highest and best level of law possible for our clients.

Representing or advocating for a client with diminished capacity

by Alex Cuello

The Rules Regulating The Florida Bar require that "[w]hen a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[1] Whether it is a prospective client, a new client or an existing client, the Rules Regulating The Florida Bar, the Aspiration Standard of the National Academy of Elder Attorneys (NAELA Standards) and the Model Rules of Professional Conduct of the American Bar Association (ABA) all address an attorney's conduct when dealing with a person with diminished capacity. This article will review and compare the common underlying principles found in these three sources available to elder law attorneys when advising a person with diminished capacity.

At the time of the initial contact by a prospective client, Florida Bar Rule 4-1.18 affords any "person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter"[2] some communication protections afforded existing clients.[3] It is essential that the attorney appreciates the importance of identifying who is the client at the onset of any communication with a prospect that may result in a client-lawyer relationship. NAELA's Aspirational Standard A, Client Identification, provides four principles to assist the attorney in distinguishing the client from the non-client(s) accompanying a prospect to a consultation that may result in the formation of a client-lawyer relationship. Under Standard A-1, the elder law attorney: "[g]athers all information and takes all steps necessary to identify who the client is at the earliest possible stage and communicates that information to the person immediately involved." Once this is established, the elder law attorney "meets with the identified prospective or actual client in private at the earliest possible stage so that the client's capacity and voice can be engaged unencumbered."[4] If the prospective client's diminished capacity makes him or her unable to appreciate the consequences of making decisions, the attorney may have no choice but to decline representation. On the other hand, if the discussion results in the person retaining the attorney, then the elder law attorney "[u]tilizes an engagement agreement, letter or other writing(s) that: identifies the client(s); describes the scope and objective of representation; discloses any relevant foreseeable conflicts among client(s); explains the lawyer's obligations of confidentiality and confirms that the lawyer will share information and confidences among the joint clients; sets out the fee arrangement (hourly, flat fee or contingent); and explains when and how the attorney-client relationship may end."[5] And to protect the integrity of the work product, the elder law attorney "[o]versees the execution of documentation that directly affects the interest of an individual only after establishing an attorney-client relationship with the individual."[6]

During the representation of an existing client, if the attorney suspects a client's interest may be determinately affected by the conduct of someone else and the client's diminished capacity prevents him or her from adequately acting in his or her own interest, part (b) of Florida Bar Rule 4-1.14 provides that "[a] lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest." In taking protective action, however, the attorney must be cautious not to make disclosures of information that run afoul of Florida Bar Rule 4-1.6, Confidentiality of Information. Absent informed consent from the client, parts (b) and (c) of Florida Bar Rule 4-1.6 limit the disclosure of information. Parts (b) and (c) state:

> (b) When Lawyer Must Reveal Information. A lawyer must reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent a client from committing a crime; or
>
> (2) to prevent a death or substantial bodily harm to another.
>
> (c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to serve the client's interest unless is it information that the client specifically requires not be disclosed;
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
>
> (3) to establish a defense to a crime charged or civil claim against the lawyer based upon conduct in which the client was involved;
>
> (4) to respond to allegation in any proceeding concerning the lawyer's representation of the client; or
>
> (5) to comply with the Rules Regulating The Florida Bar.

Part (b) of ABA Rule 1.14, Client With Diminished Capacity, provides more latitude to an attorney taking protective action for a client; it states:

> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

The flexibility in ABA Rule 1.14 is also noted in subpart (c), which states:

> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. [Confidentiality of Information]. When taking protective action pursuant to paragraph (b), *the lawyer is impliedly authorized* under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interest (emphasis added).

In addition, comments number 5 and 6 to ABA Rule 1.14 provide examples of protective measures for the attorney to consider in acting for a client with diminished capacity. Comment 5 states that protective measures can include:

- Consulting with family members;
- Using a reconsideration period to permit clarification or improvement of circumstances;
- Using voluntary surrogate decision-making tools such as durable power of attorney or consulting with support group; and
- Consulting with support group, professional services, adult protective agencies or other individuals or entities that have the ability to protect the client.

Comment No. 6 states that "[i]n determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as:

- the client's ability to articulate reasoning leading to a decision;
- variability of state of mind;
- ability to appreciate consequences of a decision;
- substantive fairness of a decision and
- the consistency of a decision with the known long-term commitments and values of the client.

NAELA'S Aspiration Standard E, Client Capacity, provides eight principles for the elder law attorney to contemplate when dealing with clients that have diminished capacity. Standards E-5 and E-6 provide guidance when the elder law attorney is considering taking protective action; they state:

> (5) When taking appropriate measures to protect the client [the elder law attorney]:
>
> > (a) is guided by the wishes and values of the client and the client's best interest;
> >
> > (b) seeks to minimize the intrusion into the client's decision-making autonomy and maximizes the client's capacity;
> >
> > (c) respects the client's family and social connections; and
> >
> > (d) considers a range of actions other than court proceedings and adult protective services.
>
> (6) Discloses client confidences only when essential to taking protective action and to the extent necessary to accomplish the intended protective action.

Lastly, Opinion 73-27 of The Florida Bar, dated Apr. 18, 1974, states that "[a] lawyer having good reason to doubt a client's competency owes his client a duty to express such doubts to him and request permission to obtain a judicial determination of the competency issue. Then, if the client refuses to consent to a competency determination, the lawyer should move for leave to withdraw from the cause, but should continue to protect his client's rights until withdrawal is permitted by the court."

When a client's ability to make adequately considered decisions is impaired and his or her attorney determines that it may be necessary to take protective action to protect the client's interest, the starting point on deciding what protective action is warranted is guided by whether or not the client consents to the disclosure of information. There are common underlying principles to guide an attorney representing someone with diminished capacity found in the Rules Regulating The Florida Bar, Model Rules of Professional Conduct of the American Bar Association and the Aspirational Standards of the National Academy of Elder Law Attorneys. An attorney deciding to take protective action involving a client with diminished capacity must adhere to two principles: First, protect the client's confidential information; and second, as far as is reasonably possible, maintain a normal client-lawyer relationship with the client. With this in mind, in taking protective action, the attorney may reveal information only to the extent authorized by the Rules Regulating The Florida Bar.

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Endnotes

1 Rule 4-1.14(a), Diminished Capacity, Rules Regulating The Florida Bar.

2 Rule 4-1.18, Duties to Prospective Clients, Rules Regulating The Florida Bar.

3 Comment, Id.

4 Standard A-2, Client Identification, NAELA.

5 Standard A-3, Id.

6 Standard A-4, Id.

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Guaranty provisions in ALF contracts: A trap for residents' family members

by Jeffery W. Van Treese II

The use of guaranty agreements or "responsible party agreements" is a disturbing practice that has become commonplace in assisted living facilities (ALFs). The language purporting to establish the family member as a financial guarantor of the resident is rarely conspicuous. In fact, guaranty provisions are often buried in a mountain of fine print either in the contract itself or in an attached exhibit. Family members may be unwittingly led to believe they are filling out paperwork that simply identifies them as power of attorney, next of kin or someone who is to be contacted in the event of an emergency. These guaranty provisions, however, contain language giving an ALF the ability to sue a family member in the event the ALF has a claim against the resident or the resident's estate.

The Federal Nursing Home Reform Act prohibits nursing homes that accept Medicare or Medicaid from requiring third-party guaranty agreements as a condition of admission. *See* 42 U.S.C 1396r(c)(5)(A)(ii), 42 C.F.R. 48312 (d)(2). By contrast, the ALF industry is virtually unregulated at the federal level. ALFs are regulated by Chapter 429, Florida Statutes, but there is no prohibition against guaranty provisions or regulation of this exploitative practice. As a result, ALFs are free to continue a practice that has been unlawful in nursing homes for several decades. Even if the family member has a valid defense, hiring legal representation to defend the case is often cost prohibitive. In many instances, the ALF can simply obtain a default judgment if the family member does not pay the facility.

One national ALF chain has utilized an admission agreement with a very unusual guaranty provision. The agreement purports to establish a guaranty relationship with any person who signs the residency agreement as a representative of the resident. The guaranty provision (labeled "Payment") reads as follows:

> If this agreement is signed by a representative on your behalf, you and the representative shall be jointly and severally obligated to the Community for payment of any fees or costs owing by you pursuant to this Agreement. The Community reserves the right to charge you, or your representative if not paid by you, for such fees and costs.

According to this provision, if an agent (e.g., a family member) signs the residency agreement as power of attorney of the resident, the ALF takes the position that the agent has agreed to guarantee any debts owed by the resident. The enforceability of this guaranty provision is questionable because the representative may have never signed the contract in his or her individual capacity. However, there is no published case law directly on point. The practice of executing contracts containing the aforementioned language defeats the purpose of a power of attorney, which is to allow certain individuals to execute or sign documents on behalf of those who are not in a position to sign for themselves. Residents with dementia or other severe mental or physical limitations may not be in a position to sign documents and may require another to sign for them through a power of attorney. An important purpose of a power of attorney instrument is to allow the agent to conduct business on behalf of the principal without fear of incurring personal liability. The aforementioned guaranty provision thwarts this purpose absolutely.

There is virtually no legal protection against the use of guaranty provisions in assisted living residency agreements. Family members should be aware of this pitfall prior to admitting a loved one into an ALF. It may be advantageous for an attorney to review the residency agreement prior to admission. If the ALF utilizes a guaranty provision in its residency agreement, it may be worthwhile to contact the director of the facility to discuss deleting that provision. Depending on the negotiating ability of the family member or the resident (if competent), it may be beneficial for the attorney to speak directly to the director to discuss the family member's concerns with respect to incurring financial liability on behalf of his or her loved one. If the facility is unwilling to admit the resident without a guarantor, the resident and the family member may wish to consider another facility.

Total and permanent disability discharge of student loans

by Jeffery W. Van Treese II

The $1.2 trillion national student loan debt is a crushing financial burden for much of our country's working population. The effect of student loans on younger Americans is relatively well known. What some may find surprising is the growth of student loan debt among the elderly population. According to a recent *Bloomberg Businessweek* article, student loan debt for Americans aged 50 and older has tripled since 2005. This debt can be more distressing still for those who are unable to work due to disability. In addition to being largely non-dischargeable in bankruptcy, student loans are one of the few categories of debt that can result in garnishment of disability payments as well as federal and state income tax refunds. For a disabled person on a fixed income, such garnishment can be devastating. It is imperative that Social Security Disability recipients, as well as disabled persons not receiving disability payments, be advised that their student loan debt may be eligible for discharge. Federal student loans, including direct loans and Perkins loans, are eligible for discharge if the borrower is totally and permanently disabled.

The total and permanent disability discharge process operates as follows:

1. Borrower submits a discharge application to the loan servicer, NelNet.
2. Application is received and collection activity will cease while the application is being reviewed.[1]
3. Application is sent to the Department of Education for approval.
4. Borrower's income is monitored for three years. Borrower's employment earnings cannot exceed the poverty limit for a family of two during this three-year period (currently $15,730 per year). Borrower cannot take out any federal student loans during this three-year monitoring period.
5. Borrower is granted a final discharge with no additional income or academic restrictions.

There are three ways a borrower is eligible for discharge:

1. The borrower is a veteran who has been determined by the VA to be unemployable due to a service-related disability.
2. The borrower is receiving SSDI or SSI, and the next review will be within five to seven years of the most recent SSA disability determination.
3. Submit a form signed by a physician certifying that the borrower is unable to engage in substantial gainful activity and that the disability has lasted for at least 60 months, can be expected to last at least 60 months or is expected to result in death.

For the first two categories, a borrower will need to submit supporting documentation. The sad irony is that these borrowers may be vulnerable to having their disability payments garnished when their eligibility for disability benefits is the very thing that qualifies them for student loan discharge. That is why it is vitally important that these borrowers be made aware of the option of discharging their student loan debt.

If the borrower does not fall under the first two categories, a discharge form will need to be filled out and signed by a physician. This form requires information related to how the disability limits the borrower's ability to work. It is important to be as detailed as possible in filling out this form. In fact, it is best practice to answer most of the questions on a separate sheet and attach it to the application. Each entry on the form itself can simply be filled in with the words "see attached." A representative form can also be submitted that will allow a representative to correspond with NelNet and to execute paperwork on behalf of the borrower. If possible, an attorney should review this form prior to its submission to NelNet to ensure that it is completely filled out and sufficiently detailed.

After the student loan discharge is approved, NelNet will mail a Form 1099 to the borrower. The discharged debt is taxable income and can be avoided only if the borrower files as insolvent on his or her tax return.

The total and permanent disability discharge provides a way to unsaddle borrowers from otherwise non-dischargeable debt in a manner that will not damage their credit. Further, the application process is relatively user-friendly, and NelNet is a competent servicer that can provide quality customer service. The applicable regulations are 34 CFR § 685.213 (Stafford loans) and 34 CFR § 567.61 (Perkins loans). Additional information as well as the discharge application and representative forms can be obtained at NelNet's website, *www.disabilitydischarge.com*.

Endnote

1 Alternatively, the borrower can call NelNet, and NelNet will notify creditors that collection activity should cease. At that point, the borrower has 120 days to submit his or her discharge application. This option is available for borrowers who cannot submit their paperwork expeditiously.

Protecting your online brand

by Stephen Burch

Attorneys have always relied on word of mouth from former clients to market their practices. The internet, especially professional review sites like Avvo and Yelp, has given clients the ability to share their opinions not just with friends and family, but with the entire world. This new ability for clients to share their reviews easily with a wide audience can be helpful to both attorneys and potential clients. Conversely, false or negative reviews can seriously damage an attorney's reputation. Attorneys need to take review sites seriously. While positive reviews can help an attorney's reputation, false and misleading reviews can damage an attorney's brand and cause him or her to lose substantial revenue.

One of the easiest and most effective ways to address a false or negative review is to respond directly on the review site. Sites like Avvo allow the attorney to respond to reviews. This gives the attorney the opportunity to explain his or her position and potentially clear up any misunderstandings. If done in a professional way, a well-written response can mitigate any damage caused by a bad review.

It is important to remember that an attorney's professional responsibilities owed to a client do not disappear because of a bad review. Take, for example, the case of Illinois attorney Betty Tsamis, who received a bad review from a former client that Tsamis believed was "simply false." Tsamis asked her former client to remove the review, but the client refused unless he received a full refund. In response, Tsamis replied to the review explaining her position. But Tsamis' reply was not limited to addressing the review. She took the opportunity to reveal negative information about her former client. In her reply, Tsamis stated the following: "I feel badly for him, but his own actions in beating up a female coworker are what caused the consequences he is now so upset about." Due to this revelation of information, the Illinois Attorney Registration and Disciplinary Commission filed an ethics complaint against Tsamis, and she was formally reprimanded for posting her client's privileged information. So, while a response to a negative review is usually the best option, attorneys need to ensure that they do not violate any ethics rules in the process.

When faced with a negative review, an attorney may feel compelled to "drown out" the bad review with positive reviews. This is what Julian McMillan, a San Diego attorney, was accused of doing on the review site Yelp.

In *Yelp, Inc. v. McMillan Law Group. Inc.,* Cal. Super. Ct., S.F., No. CGC13-533654, Yelp accused McMillan of using his employees to set up fake Yelp accounts to post fake positive reviews of his law firm in an effort to overshadow one negative review he had received from a former client. In addition to being a likely violation of the FCC's advertising rules, an attorney who posts fake reviews about himself would most certainly be in violation of Florida's Rule of Professional Conduct 4-7.13, which forbids deceptive and inherently misleading advertising. Beyond the legal and ethical concerns, allegations like this can damage an attorney's brand well beyond what a single negative review could.

Some reviews are so factually inaccurate and defamatory that a response will not help, and those reviews need to be removed. Sites like Avvo and Yelp have the option to report false reviews. While this is the path of least resistance for the attorney, review sites are often resistant to remove reviews, especially negative reviews. If the site refuses to remove the review, the only other way to have the post removed is to file a lawsuit against the reviewer. If the attorney knows who posted the review, this is a straightforward process. If the identity of the reviewer is unknown, however, the attorney may need to subpoena records from the review site. This can be a time-consuming process since review sites vigorously guard their posters' anonymity.

For example, in *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 62 Va. App. 678, 685, 752 S.E.2d 554, 557 (2014), Hadeed Carpet Cleaning Inc. believed that many of the negative reviews on Yelp concerning the company were false and posted by a competitor. Hadeed subpoenaed Yelp for the identity of the posters, and Yelp objected. After a hearing, the circuit court ordered Yelp to produce the identities. Yelp still refused to produce the identities and was held in contempt. Yelp then appealed the decision to the Virginia Court of Appeals, which affirmed the trial court's order. It was not until after the appellate decision that Hadeed finally received the identities of the posters and could proceed with its suit.

It is worth noting that attorneys should not make the mistake of including the review site as a defendant and, instead, should stick to suing only the reviewer when possible. In most cases, review sites are immune from the defamatory statements of their users under § 230 of the Federal Communications Decency Act. See, e.g., *Braverman v. Yelp, Inc.*, 2013 NY Slip Op 31407 (NY Sup. Ct., June 28, 2013). While attorneys may feel frustration toward the review sites, adding them as a defendant will only increase costs and fees and will, in most cases, prove futile.

For better or worse, the internet has changed how attorneys are rated and reviewed by their clients. Attorneys ignore these sites and their clients' reviews at their own peril. When attorneys encourage good reviews and work in good faith with clients who have had bad experiences, they can increase their positive presence on the internet and increase their client base. As such, attorneys should keep a close eye on their reviews to ensure that there are no unexpected negative reviews.

If you need help monitoring your online presence or responding to negative reviews, contact Smith & Associates at 321/676-555 or visit our website at *smithlawtlh.com* for assistance.

***Stephen Burch** spent 10 years as a software engineer before joining Smith & Associates as an attorney. He now focuses his practice on intellectual property law, internet law and commercial litigation.*

To have and to hold

Can parents protect Florida trust assets from garnishment by a former spouse of their child?

by Christopher Papa

Introduction

Nearly half of all marriages end in divorce. Parents who wish to use a trust as an estate planning device are well advised to consider this fact when setting up their asset protection plan. Given the unpredictability of family law court, a parent may need to consider whether trust assets could be substantially depleted by a party who is no longer married to the intended beneficiary. Florida's trust code allows for substantial protection of trust assets against most creditors, but this protection is not as much as many attorneys assumed, in light of the 2013 decision in *Berlinger v. Casselberry*, 133 So.3d 961 (Fla. 2d DCA 2013).

Florida provides for an attractive planning opportunity in the form of a discretionary trust. A discretionary standard of distribution can shield trust assets from claims by a beneficiary's creditors indefinitely because the trustee cannot be compelled to make distributions. Moreover, many asset planners have assumed that the discretionary standard would further prevent a creditor from garnishing the distributions. However, the 2nd DCA decision in the case of *Berlinger* casts significant doubt on an asset planner's ability to prevent a continuing writ of garnishment for a specific kind of creditor: the beneficiary's former spouse. This article discusses the potential pitfalls of planning to protect assets from being reached by statutory "exception creditors," particularly an ex-spouse creditor.

The protective power of a discretionary spendthrift trust

In Florida, a spendthrift clause allows asset planners to prevent beneficiaries from thwarting the settlor's intent by transferring their future interest in the trust for a quick lump-sum payout. It further protects against depletion of the assets by barring an involuntary assignment of the beneficiary's right to payment—via a judgment creditor, for example. Florida recognizes the validity of such spendthrift provisions restricting the alienability of trust assets in § 736.0502 of the trust code. Such a provision is only valid if it "restrains both voluntary and involuntary transfer of a beneficiary's interest." The trust need only state that the beneficiary's interest is held subject to a spendthrift trust, or use language of similar import, in order to adequately convey the necessary restriction on transfer.

The spendthrift protection is further enhanced when combined with a trust provision applying a pure discretionary standard to distribution decisions made by the trustee. Section 736.0504 of the trust code provides that a creditor may not force a trustee to use his or her discretion to make a distribution. Moreover, a creditor cannot "attach or otherwise reach the interest, if any, which the beneficiary might have as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary." In short, a creditor is not entitled to any assets in which the beneficiary has a mere expectancy. The statute could reasonably be interpreted to mean that the beneficiary must have taken receipt of the assets before the creditor can attempt to recover. Assets held in this fashion have the attractive feature of potentially motivating a creditor to agree to a more debtor-friendly settlement than if the assets were exposed.

However, § 736.0503 provides for

continued, next page

three classes of creditor that can overcome the spendthrift protection. First, the child, the spouse or the ex-spouse of a beneficiary can collect based on a court order or judgment compelling the beneficiary to make payments for support or maintenance. Second, a judgment creditor who has rendered services to the trust at issue can similarly enforce judgment against the trust. Finally, the federal and state governments can collect against assets so protected as provided by law. But satisfaction may not be immediate for these exception creditors—the assets cannot be collected until the time of distribution.

Prior law and the recent *Berlinger* decision

Can a beneficiary's former spouse be a successful judgment creditor against a discretionary spendthrift trust? Before the new trust code was adopted in 2006, the Florida Supreme Court, in *Bacardi v. White*, 463 So. 2d 218, 222 (Fla. 1985), allowed a former spouse to reach the beneficiary's interest in a discretionary spendthrift trust, but only once the discretion had been exercised. The court determined that Florida has a strong public policy interest in protecting alimony and child-support creditors. Accordingly, a writ of garnishment could be an appropriate last resort for collection from a discretionary spendthrift trust when traditional collection methods have failed. In *Bacardi*, the court proscribed a limited right to garnish trust distributions under both mandatory and discretionary distribution standards:

> If, under the terms of the trust, a disbursement of corpus or income is due to the debtor-beneficiary, such disbursement may be subject to garnishment. If disbursements are wholly within the trustee's discretion, the court may not order the trustee to make such disbursements. However, if the trustee exercises its discretion and makes a disbursement, that disbursement may be subject to the writ of garnishment.

The court, however, emphasized that a trustee governed by a discretionary distribution standard could not be compelled to use that discretion in favor of the exception creditor. But if the trustee did choose to distribute any assets on behalf of the beneficiary, then those assets would be subject to garnishment, regardless of the spendthrift provision.

When Florida adopted the trust code in 2006, the statute included language that seemed to overrule *Bacardi*. The code stated that a creditor, including exception creditors such as former spouses, could not "attach or otherwise reach the interest" of a beneficiary of a discretionary trust. This seemed like fantastic news for asset planners, who could apparently shield spendthrift trust assets from even exception creditors so long as the distributions were discretionary. The explicit language applying § 504 to § 503(2) exception creditors seemed highly supportive of this interpretation.

In the *Berlinger* decision, however, the 2nd DCA held that *Bacardi* is still controlling law, in spite of the recent trust law codification. In that case, the court made a questionable distinction between "attaching an interest" in a discretionary trust and garnishing a distribution after a trustee has already exercised his or her discretion. According to this court, the latter can be subject to a continuing writ of garnishment. Notably, however, the court affirmed the notion established in *Bacardi* that a creditor still cannot compel a trustee to use his or her discretion to make a distribution in the first place. This puts the trustee in a difficult position: If the trustee makes a distribution, then it will be garnished, and this could be a violation of the trustee's fiduciary obligations. On the other hand, if the trustee makes no distribution, then the trustee might avoid a breach of duty, but will thwart the settlor's intent to provide for the beneficiary. Perhaps the 2nd DCA felt particularly compelled by facts of *Berlinger*: The trustee exercised his discretion to pay off the beneficiary's monthly credit card bills supporting a lavish lifestyle. Meanwhile, the beneficiary voluntarily refused to make support payments to his former wife in spite of a judgment against him. The long-term policy and planning issues may cause the Florida Supreme Court to overrule the 2nd DCA. *Berlinger* has been appealed, but it is not clear whether the high court will hear the case.

Possible concerns over establishing an out-of-state trust

A trust attorney may look at the uncertainty created by *Berlinger* and seek an alternative. One way to address a client's concerns about the pursuit of trust assets by a beneficiary's former spouse is to establish the trust outside of Florida. The trust laws of Alaska, Delaware, Nevada and South Dakota are generally more protective than even Florida's fairly protective approach to discretionary trust distributions. But in the event that much of the trust assets are located in Florida, there is some uncertainty to this approach as well. This is due to some recent case law that applies directly to self-settled domestic asset protection trusts (DAPTs), but it may have some broader application.

Self-settled trusts with spendthrift protections are not permitted under Florida law and are generally disfavored as a more significant public policy concern than the type of spendthrift trust contemplated in *Berlinger*. Such a trust typically has a discretionary standard of distribution as well as a spendthrift clause, but the settlor is also the beneficiary. This has the potential to allow a debtor to avoid his or her looming creditors by placing exposed assets in trust. Several states are in a race to attract trust business by preventing creditors' access to properly shielded assets. There are no cases that affirm the validity of DAPTs; rather, there are only a handful of cases that focus on when a self-settled trust fails. Continuing proponents of DAPTs contend that all of these cases are based on particularly egregious facts, such as funding the trust through fraudulent conveyances or the application of the bankruptcy code's 10-year claw-back rule under § 548(e). Thus, there is still reason to believe that a properly established DAPT should not be affected.

But a recent bankruptcy court case concerning a DAPT, *In re Huber,* 493 B.R. 798 (Bkrptcy. DC Wash., 2013), suggests that it is possible for a creditor of a trust beneficiary to argue that the law of the state where the trust is formally established should not be applied. Instead, the case holds that, at least in the case of self-settled trusts, there must be a "substantial relationship" between the trust's assets and the state where the trust is established and administered in order to respect the settlor's choice of law. A nominal relationship to the jurisdiction where the trust is established is insufficient. For example, in *In re Huber*, the settlor and co-trustees resided in Washington State while only the institutional trustee was based in Alaska. Moreover, the trust was funded predominantly with real property located in Washington as well as the settlor's interest in several business entities not located in Alaska. The trust was not settled until after it was clear to the settlor that he would become insolvent. Finally, Washington has a strong public policy against self-settled asset protection trusts. Based on these factors, the bankruptcy court ultimately determined, under a federal conflict of laws analysis, that Washington law should apply, under which the assets of a self-settled trust are exposed to creditors' claims. Similarly, under Florida's § 736.0505, a spendthrift provision is disregarded with respect to distributions made for the benefit of the settlor. It is not clear, however, whether the reasoning of *In re Huber* would be applied to non-self-settled trusts, like the discretionary spendthrift trust in *Berlinger*. But estate planners should consider the potential risks and additional expenses that may be associated with selecting a nominally related forum as the trust's jurisdiction.

Conclusion

Florida's strong public policy in favor of enforcement of alimony and child support payments imposes significant restrictions on a settlor's ability to shield a trust's assets from a former spouse exception creditor. But through the use of a pure discretionary spendthrift trust, a trustee will be able to use his or her discretion to avoid the exception creditor, albeit at the expense of making distributions to the debtor beneficiary. This choice may be avoided through use of an alternative jurisdiction, but such planning should be done with caution in light of the bankruptcy court's public policy developments in *Huber*.

***Christopher Papa** graduated from the University of Miami with the B.S. degree in accounting. Through the University of Miami School of Law's joint degree program, he earned the J.D./LL.M. in taxation, cum laude, with a concentration in international tax law.*

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Section News

Mark your calendar!

Fundamentals of Elder Law
January 15, 2015
Orlando

Executive Council Meeting
January 15, 2015
Orlando

Elder Law Section Annual Update
January 16-17, 2015
Orlando

The Florida Bar Winter Meeting
Hilton Orlando
January 22-24, 2015
Lake Buena Vista

Third Annual Elder Law Symposium
February 11, 2015
St. Thomas University School of Law
Miami Gardens

ELS Executive Council Meeting
March 26, 2015
Tampa

Guardianship CLE
March 27, 2015
Tampa

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

ELS Executive Council Award Luncheon
June 26, 2015 • 12 noon-2 p.m.
Boca Raton Resort & Club

ELS Executive Council Meeting
June 26, 2015 • 2-4 p.m.
Boca Raton Resort & Club

Elder Law Section Retreat
October 16-18, 2015
New Orleans

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

The Florida Bar Elder Law Section

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Thank you to our sponsors:

Getting involved

by Donna R. McMillan

As I passed the anniversary of my admittance to the Bar, I began thinking about what makes a good elder law attorney and on a more global basis, what makes a good elder law section. The answer to both is simple, colleagues and involvement. We are all familiar with the saying it takes a village to raise a child. That's true regarding our professional development as well; it takes a section to grow a great attorney.

Lawyers often joke that they call it the "practice" of law for a reason: The law is vast, ever changing and difficult to master. This is especially true of elder law as the field encompasses so many different subspecialties. An effective elder law attorney, then, is constantly learning and seeking out new sources of information and new contacts with expertise. Our elder law colleagues and our section have the reputation of being one of the nicest and most helpful sections of The Florida Bar. See for yourself. Just attend any one event of the section and you will come away with contacts who are willing to share their knowledge, assist with questions about a difficult case or guide you to the right resources.

So, how do you get involved?

Attend a CLE or other event. In January 2015, the section is offering a three-day CLE in Orlando. The first day, Jan. 15, is Fundamentals of Elder Law, great for new attorneys or attorneys trying to expand their existing practice to include elder law. Days two and three, Jan. 16-17, are the Elder Law Section Annual Update, providing more advanced information for the elder law practitioner. This is a great way to meet your colleagues and gain valuable knowledge. I came away last year with 10 contacts located throughout the state who were willing to share their knowledge, support and expertise with me! Want to know more about guardianship? On Mar. 27, 2015, the section is sponsoring an advanced Guardianship CLE in Tampa. On Oct. 16-18, 2015, the Elder Law Section Retreat will be held in New Orleans. Attend the CLE, network and have a great time getting to know your colleagues.

Join a committee. Did you know that the Elder Law Section has 11 substantive committees and eight administrative committees? Don't think you know enough to join a committee? You don't have to. The committees are a great way to expand your knowledge in an area you need to know more about. Fit a one-hour teleconference into your schedule and you'll learn the latest information in the field. If you're an expert in a particular area, we need you to share your knowledge to help other members of the section. Meeting times and schedules vary by committee. Go to the committee page of The Florida Bar Elder Law Section's webpage (or see page 17 of this edition), email a chair and get involved.

Every other month, the Mentoring Committee sponsors the "Tricks of the Trade" call, a one-hour teleconference with an expert in a particular subspecialty of elder law. Initially set up to assist those newer to the practice area, even the more seasoned practitioners have been known to attend. Time is set aside during each call for attendees to have their questions answered. This call is free to all members.

Practicing less than five years? The Mentoring Committee is setting up practice area study groups by subspecialties for members to enhance their knowledge of elder law and to support their colleagues. Email Beth Waddell at *beth@waddellelderlaw.com* to sign up.

Did you know the executive council meetings are open meetings that you can attend? The Executive Council meets four times a year. You'll get a chance to hear a report from the committee chairs and discover the most pressing issues our section is facing.

The Elder Law Section has many ways for you to get involved, expand your knowledge and gain valuable contacts. Take the first step: Attend an event or contact a chair and join a committee. Then watch your knowledge and professional development skyrocket. Let's expand our reputation by being not only the nicest and most helpful section of The Florida Bar, but also the section with the most member involvement.

***Donna R. McMillan** received the J.D. summa cum laude from Nova Southeastern University and the M.S.W. and the B.L.S. from Barry University. Prior to law school, she spent almost nine years as a hospice social worker and was on the Leadership and the Community Outreach committees of the Department of Veteran Affairs South Florida Hospice-Veteran Partnership. She is an associate at McCarthy, Summers, Bobko, Wood, Norman, Bass & Melby PA in Stuart, practicing exclusively in elder law and estate planning. She is co-chair of the ELS Membership Committee.*

For Your Practice

A yearly checkup for your law practice: *Five essentials*

by Twyla Sketchley

When was the last time you gave your law practice a checkup? Health professionals recommend that you get a medical checkup at least once a year. Your practice should be no different. Each year, every attorney should give his or her practice a checkup, whether the attorney is in charge of a practice or is one of several in a larger firm. The beginning of a new year is a good time for this checkup. You can review many areas of your practice, but these five are essential:

1. Review the finances

While most attorneys did not begin practicing law just for the money, money is necessary to keep practicing law. After all, a kind spirit and competent legal skills alone do not pay rent, utilities or filing fees. Therefore, a financial review at the beginning of every year is essential to the survival of any practice. While a brief financial review is often done in conjunction with filing and paying taxes, such a simple review may not be as complete as it needs to be to determine the health, efficiency and profitability of a law practice.

A complete financial review should look at not only the gross and net income and the balance sheet, but it should also review at least the following:

- total billed for the year both in number of hours and in total dollars;
- total practice overhead for the year;
- net income;
- total of accounts receivables (A/R);
- age of the A/R (30, 60, 90 or 90+ days);
- total A/R compared to the total billed for the year (how much of the amount billed is unpaid—10%, 20%, 30%, etc.);
- hourly rate of each billable employee/attorney;
- total amount that each billable employee/attorney billed throughout the year versus the actual amount collected of his or her total;
- each employee's/attorney's effective collected hourly rate (the amount collected for an employee divided by the number of hours billed by that employee);
- amount of income generated by each practice area (Medicaid, guardianship, estate planning, VA, etc.);
- flat fees set for flat fee tasks or cases versus the time spent by all employees/attorneys;
- total of each category of expenses (marketing, rent, insurance, taxes, utilities, salaries, professional dues, office supplies, etc.);
- practice's past due bills (bills the practice has not paid);
- change in gross income over the past three years; and
- change in net income over the past three years.

The information listed may seem overwhelming; however, much of it is already collected through your practice's financial transaction tracking system and is readily available from your accountant, your accounting and practice billing software or your bookkeeper if you ask for it or run the right software-generated report. Quicken, QuickBooks and Peachtree are all capable of running reports based on categories, vendors, clients or other information. For more information about law practice finances, visit The Florida Bar's Law Office Management Assistance Service (LOMAS) website, *www.floridabar.org/lomas*.

A thorough financial review can help determine the financial health of a practice as well as the profitability of each employee/attorney. For example, determining the effective hourly rate collected for each employee can help determine whether a billable employee is paying for his or her position, even in flat rate cases. If an employee is supposed to be generating $85 an hour for the firm, but the practice is only collecting $25 an hour for that employee's work and the salary and benefits equal $30 an hour, then this employee may not be being used efficiently within the practice. Adjustments must be made to make that employee profitable. Once a practice begins to systematically review this information, it can begin to make changes, some very small, that can make a big difference in its overall profitability.

This information can be tailored to provide a financial picture for solo practitioners, small firms and even individual practices within a larger firm. Knowing the financial status of a personal practice can also be helpful to young associates who are responsible for an amount of overhead in a larger firm and who must meet certain billable, collectible and profitability benchmarks.

2. Review the staff

The face of a law practice is its staff. How each staff person functions individually and as part of the team impacts how a practice operates, its prosperity and the morale of other team members. Each year, every staff member and attorney in a practice should be reviewed. Sample employee review forms and practice management materials are available through LOMAS or the American Bar Association (ABA) Law Practice Division.

The most basic review of each person should include:

- name(s) of the reviewer;
- number of employee absences;
- number of employee late arrivals or early departures;
- itemization of discipline actions taken in the past year;
- list of the duties and responsibilities of the employee or attorney;
- evaluation of whether the employee/attorney has adequately fulfilled assigned duties and responsibilities;
- list of skills or abilities that can/should be improved;
- plan for improving over the coming year (assuming the employee/attorney is not being terminated); and
- at least one goal or expectation the employee/attorney is expected to reach in the coming year (assuming the employee/attorney is not being terminated).

Based on this review, a practice can determine which employees to keep, which may need to have their duties and responsibilities modified, which should be promoted and which should be terminated. Efficient, competent employees working at their best can improve nearly everything about a firm, from profitability to reputation in the community.

3. Review the law that primarily affects your practice area

In elder law, laws change each year. For example, the Medicaid penalty devisor, the federal benefit rate and the community spouse income allowance all change nearly every year; guardianship and probate rules are updated regularly due to periodic court review and case law; and each year, the Florida Legislature makes changes to any number of statutes that affect elder law. Clients are paying an attorney or a law practice for this knowledge to be current and correct. Therefore, an annual review of the law is essential to producing the best product.

An annual review of the law should include a review of the Florida probate code, guardianship law, the Department of Children & Families (DCF) Economic Self Sufficiency Manual, case law affecting elder law, Florida Administrative Code chapters that impact Medicaid and other public benefits, federal statutes and case law impacting government benefits, as well as law developments that are often outlined here in *The Elder Law Advocate*. An annual review of the law should also include live attendance for at least one full-day elder law CLE. The most popular elder law CLEs in Florida are the Academy of Florida Elder Law Attorneys' (AFELA) UnProgram in December of each year and the Elder Law Section's Annual Update (formerly the Certification Review) in January of each year.

4. Review the clients

Clients are the reason we practice, yet lawyers often do not review the impact that clients have on a practice. The yearly review of clients can be one of the most meaningful exercises for practice improvement that an attorney can do all year. The types of clients within a practice determine the amount of income a practice generates, the morale of the staff and the efficiency of the overall practice. At the beginning of each year, make a list of each client and case open in the practice. For each case and each client on that case, determine:

- whether the client has timely paid bills over the past year or has an outstanding balance;
- how long any outstanding balance has been outstanding;
- how large the outstanding balance is;
- how often the client failed to follow your instructions;
- how often the client failed to meet a deadline;
- whether the client disputed bills in the past year and about what;
- whether the client has been rude to staff;
- how many cases you have with the client; and
- how long the client has been a client.

Create a scoring system based on the answers to these questions. (I use an A, B, C, D and F scoring system, with an A client being one who has been with the firm for a while, follows advice, meets deadlines, pays bills timely, has no outstanding balance and treats staff with respect.) Assign each client a score based on these factors (and any other that are unique to your practice).

If your practice is full of A clients and you have no outstanding balances, you are amazing, have a good practice and need to take your technique on the road! However, if your practice has mostly C, D and F clients, you may need to consider "firing" some clients and changing your client intake process to do a better job of screening out the "bad" clients. For more information about how you can spot potential "bad" clients, read "It might be a bad client if …" in *The Elder Law Advocate*, Vol. XXII, No. 2, Summer 2014.

As you review your clients, also ask yourself: "If I were not being paid for working for this client, would I still work on this matter or is there something I would rather be doing?" If the answer is that you would rather be doing something else, fire your non-paying client and fill the time with marketing to better clients.

continued, next page

Yearly checkup
from preceding page

5. Review referral sources

Every practice should track client referral sources. This can be done on the initial intake form completed by potential clients or within your practice management software as you are opening a file. A referral source review should include not only a determination of who or what sent the most referrals over the past year, but also:

- kinds of referrals received by a particular source (Medicaid, guardianship, estate planning, etc.);
- quality of the clients referred by a particular source (are they paying clients, good or bad clients as determined by your scoring system, etc.); and
- basic demographical information about the clients from a particular source (age, sex, ethnicity, religion, profession, income, family configuration and geographical area).

Based on this review, you can create a campaign to thank your referral sources as allowed by the Rules Regulating The Florida Bar and set goals regarding where you will focus your coming year's marketing efforts. A referral source review will also help a practice figure out other referral sources that should be referring cases but are not.

After conducting an annual law practice checkup, new goals and benchmarks should be set for the firm. Every member of the law practice should be given a brief overview of these goals or benchmarks and the goals they are expected to meet. As a practice moves forward, this annual checkup can be adapted to change the direction of a practice, to create an exit strategy for retiring attorneys or to set values for mergers or sales.

***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.*

ACCESS Florida

DCF updates ACCESS Florida

In November 2014, the Department of Children and Families (DCF) made changes to ACCESS Florida, the system used to determine Medicaid eligibility. As a result, some of the Adult Related Medicaid manual processes have been automated in the ACCESS Florida system.

DCF is confident that ACCESS Florida users will notice operational efficiencies with these changes and that Adult Related Medicaid stakeholders should see no change in their day-to-day operations.

DCF expects there to be NO Adult Related Medicaid policy changes as a result of the system's modifications.

The changes were "behind the scenes" and should have no direct impact on stakeholders working with Adult Related Medicaid customers.

Committees keep you current on practice issues

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

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CLE Committee

Sam Boone, chair

We are looking forward to an exciting year of informative CLE courses under the strong leadership of Jana McConnaughhay and David Hook. Those of you who were present at the Elder Law Retreat and had the opportunity to attend The Elder Law Attorney as Lover and Fighter CLE know the value of the section's continuing legal education presentations. For those of you who were not able to attend, you can buy audio versions of that presentation on the Florida Bar's website *(www.floridabar.org/TFB/TFBResources.nsf/Attachments/181FC0AEEB3AA6FA852576BA0071042D/$FILE/Audio_CD_DVD_List.pdf?OpenElement)*.

I hope everyone has registered by now for the Jan. 15, 2015, Fundamentals of Elder Law and the Jan. 16-17 Elder Law Section Annual Update. Those seminars will take place at the Loews Portofino Bay Hotel in Orlando. This is a great venue, and these three days will contain some of the most informative presentations on elder law in the state.

On Mar. 27, 2015, there will be a CLE on guardianship. The venue has not yet been determined, but mark your calendars. The program is entitled Elder Law Guardianship 101.

Finally, mark your calendars for the Elder Law Section Retreat in New Orleans, Oct. 16-18, 2015. Although the topic has not yet been developed, we always have an interesting CLE presentation and I, for one, look forward to attending it in New Orleans.

If anyone is interested in trying to organize a CLE program, please contact me so we can discuss a topic and possible times.

Guardianship Committee

Carolyn Landon and Victoria Heuler, co-chairs

The Guardianship Committee usually meets by telephone at 12 noon on the second Wednesday of every month. Currently we have decided to meet on an as-needed basis.

We are working closely with the Legislative Committee to stay abreast of proposed changes to the Florida guardianship law that we understand will be forthcoming during the next legislative session.

We are excited to be part of the planning of an advanced course guardianship intensive seminar on Mar. 27, 2015, in Tampa.

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

Law School Liaison Committee

Alex Cuello and Enrique Zamora, co-chairs

The Law School Liaison Committee is sponsoring the Third Annual Elder Law Symposium at St. Thomas University on Feb. 11, 2015. This is an annual event for Florida's elder law community. This year the program is titled "On Rocky Terrain: Managing Curious Situations as an Elder Law Attorney." This informative event will encompass various practical subjects in elder law to include threshold ethical considerations for elder law practice, drafting trusts, Medicaid planning issues and a panel on professionalism for the elder law attorney on social media. The speakers for this event will be Howard Krooks, Esq., CELA, CAP; Candis Trusty, Esq.; Rosa Romero, Esq.; Professor Eloisa Rodriguez-Dod (Florida International University College of Law); Professor Donna Litman (Nova Southeastern University Shepard Broad Law Center); and Alex Cuello, Esq. This event will be offered for CLE credit by The Florida Bar, and there is no cost to attend. St. Thomas University School of Law is located at 16401 NW 37th Avenue, Miami Gardens, FL 33054.

Personal services contracts - A professional tool

Tips & Tales

by
Kara Evans

The tale: A woman calls you from Colorado. She found you on the internet. You are close to the nursing home in Florida where her 95-year-old mother is living. She heard from her neighbor that her mother can give her children all of her money (over $300,000) and qualify for Medicaid. All she has to do is sign some kind of personal care contract. All of the children live in Colorado. Can you help them with this contract?

The tip: Part of what we do for our clients is to clarify what they read on the internet, what the neighbor said or what "they say." Your clients may enter your office with certain expectations, many of which may be unrealistic. It is your job to explain to them what is actually possible and appropriate.

We all know that a person in a nursing home will not get all of the attention and personal care he or she may need. The facility may be understaffed, and the staff is often overworked. Someone will be expected to shop for personal necessities; to handle financial matters; to attend care management meetings; to act as a health care advocate; and to oversee treatment by health care providers, doctors, therapists and rehabilitation facilities. A child providing services that are in addition to and not duplicative of those supplied by the nursing home can be quite a benefit to the parent. Many children provide these services, taking time away from work and other personal or household obligations. They sacrifice their time and employment opportunities to become caregivers. Being compensated for these services is often the only way that a child of an aging parent can realistically provide them.

A personal care contract, also known as a personal services contract, is exactly that. It is a legal agreement that sets out the responsibilities, duties and obligations that the child will perform. The contract must be for a stated period of time not to exceed the life expectancy of the individual who will be receiving the services. This is a fair market value exchange, and the services provided must be commensurate with the compensation agreed to. A good measure for this compensation is to canvas the professionals in your county to see what you would pay court-appointed family guardians or home health aides. Using this tool is a great vehicle to ensure that a child is properly compensated for providing the services required to care for his or her family member.

What a personal services contract is not is a sham or a ruse to move money for Medicaid qualification purposes. The services set out in the agreement must be provided, and the hours for care must be reasonable. The personal services contract is a professional tool that should be used professionally.

There are other techniques available for you to assist the caller's family. In this case, none of the children live in the same area as their mother. Even though some services could be provided from a distance, the amount of money involved and the distance away that the children live make the personal services contract unsuitable for this particular family.

As attorneys, counselors and advisors, we have an obligation to use the tools at our disposal fairly and wisely. Our clients rely on us to guide them appropriately. The regulators at the Department of Children and Families look closely at personal services contracts to ensure that they do, indeed, meet the contractual obligations, that they are not duplicative of services and that the time spent on providing care is reasonable. Show them you are a professional by creating contracts that comply with the rules so we can continue to use this tool to assist our clients and their families.

Tax tips for elder lawyers

TAX TIP$

by Michael A. Lampert

Basis: The new (and old) elephant in the room

What has happened to tax rates over the last 5 to 10 years? The estate and gift tax rates (40% maximum rate) have been reduced, and there is an exemption amount ($5.34 million in 2014) that eliminates the estate tax for the vast majority of our clients. Yet the overall income tax and capital gains rates, after taking into account the Medicare surtax, net investment income tax, phaseouts of itemized deductions and other special rules, inch their way up. With so few clients subject to the estate tax, it is easy to say when doing estate planning, "Phew—don't need to worry much anymore about taxes." Unfortunately, this is not true. Many tax issues still must be considered. This article will address one of the issues, and it is the elephant in the room:

Basis.

In its simplest form, if you pay $10 for an asset (not inventory) and sell it for $18, you have an $8 gain ($18 minus $10). If held for more than one year, it is long-term capital gain. For 2014, there is a top capital gain rate of 15 percent for most taxpayers, 20 percent for high-income taxpayers, 28 percent for collectibles and 25 percent for depreciation recapture. Yet basis rules can be very complex, and there are many traps.

Every reader of this article (should) already know that in most cases when a beneficiary receives an asset from a decedent, the value of the asset steps up (or down) to fair market value (IRC § 1014(a)). As noted in my article in *The Elder Law Advocate*, Vol. XXII, No. 2, Summer 2014, this also works in reverse. When the asset has gone down in value, the asset's basis steps down to the fair market value as of date of death, so:

Tip #1

Be careful if your clients give away appreciated assets during their lifetime. While clients love to "avoid probate," if the asset is given away during their lifetime, there will not be a basis step-up on the gifted asset (IRC § 1015) the way there would be if held at death. (The basis does increase by the amount of gift tax paid by the gifter, if any.) This is often part of the balancing act in Medicaid planing.

Tip #2

Consider selling a loss asset before gifting the asset away so that the gifter can take the income tax loss. If the loss asset is retained until death, the loss will be lost because the basis will step down to fair market value.

So, why not just gift it at a loss, and if the recipient can use the loss, let them take it?

Trap #1

In most cases, if you gift away a depreciated asset (fair market value is less than the basis) and the recipient sells it at a *gain*, the recipient uses the grantor's basis. If the recipient sells the asset at a loss, the recipient uses the fair market value at the time of the gift (IRR 1.1015-1(a)(1)). This is a trap for the unwary.

What about giving the asset to someone expected to die soon, with the hope that it will come back to the gifter after the grantee's death?

Trap #2

If an appreciated asset is gifted to the decedent within one year of the date of death of the decedent and the gifted property is then reacquired from the decedent (or passes from the decedent back to the gifter), the basis does not step up (IRC § 1014(e)).

Tip #3

If the grantee does outlive the one-year period, the recipient gets the basis step-up. If you do not expect the recipient of the gift to live one year, perhaps have the recipient of the gift (the person "about to die") cause the asset to go to another family member at death.

What about existing shelter trusts and other irrevocable instruments?

There are many existing credit shelter trusts, family limited partnerships and other vehicles where the goal was to keep the value of the asset either out of the grantor's estate for estate tax purposes or to reduce the value of the underlying assets in the grantor's estate by using discounted values (such as minority interest, lack of control, etc.). Yet at death there will be little or no basis step-up. If there would be no estate tax regardless, the basis step-up is a good thing. So ...

Tip #4

Consider shutting down the credit shelter trust if permitted under the trust instrument and consistent with otherwise good planning. With the assets in the surviving spouse's name, when the surviving spouse dies, the asset should get a basis step-up.

Tip #5

Look at assets in grantor trusts. Can low-basis/high-value assets be swapped out for cash from the grantor? Assuming it is a grantor trust, there should be no taxable result on the swap. This can allow the asset to receive a basis step-up at death and not have a current income tax effect.

Reverse discount planning: For years, estate tax planners have tried to argue that the value of an asset is less than it might appear. For example, if a parent owns 50 percent of a $100 asset, it might be argued that because the 50 percent interest is not controlling, it is worth something less than $50 (50% of $100). With estate tax planning, ownership of entities such as family limited partnerships and S Corporations are often owned by a parent in a way where the parent has a minority interest, has no control and the interest is not freely transferable. From an estate tax viewpoint, this can reduce the value of the asset in the parent's taxable estate. But from a basis step-up viewpoint, it is a disaster. The 50 percent interest doesn't step up to $50 at death. It might, instead, only step up at death to the discounted value. But ...

Tip #6

What if we plan in reverse? What if we give (sell) the parent a little higher percentage interest in the entity? Even one percent more (50% plus 1%) usually gives the control for many things, and it is a majority in interest. Sixty percent or more gives them even more control. So, the 51 percent interest might be worth, say $60. This increase in basis to $60 (instead of the $51 based on a simple 51% portion of $100) can provide significant tax savings when the asset is sold or, if depreciable, when it is depreciated.

Reminder: An LLC (taxed as a partnership) and a partnership can elect (a Section 754 election) at the death of an owner to step up the assets inside of the entity based on the percentage owned by the decedent. This can result in significant income tax savings when assets of the entity are sold.

But what if you want a trust to have some control over the assets at the death of the second spouse?

Tip #7

Consider using a QTIP (qualified terminable interest trust) election to include the trust assets in the estate of the second spouse to die. This can cause the basis step-up at the death of the second spouse to die while still utilizing a trust for the surviving spouse.

This article is a bit different from many of my tax tip articles. While still brief, and while only scratching the surface of the rules, it is an attempt to get elder lawyers to focus on basis planning in estate planning for clients. Take basis planning into account during checkups, Medicaid planning and initial planning and when reviewing asset lists, trusts and other entities. Ask: Can I help get a basis increase for the family consistent with their overall estate planning goals?

You will see increasing numbers of articles and seminars on basis issues. Basis truly is becoming the new elephant in the room.

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

Call for papers – *Florida Bar Journal*

Jana McConnaughhay is the contact person for publications for the Executive Council of the Elder Law Section. Please email Jana at *jana@mclawgroup.com* for information on submitting elder law articles to The Florida Bar Journal for 2014-2015.

A summary of the requirements follows:

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

Review is usually completed in six weeks.

Summary of selected case law

by Diane Zuckerman

Breach of trust, fiduciary duty

William Kritchman, etc., et al., Appellants / Cross-Appellees, v. Hunter Wolk, Appellee / Cross-Appellant, Case No.'s 3D12-2977, 3D12-2457 (3d DCA October, 2014)

This case provides a cautionary tale for practicing trustees and reminds us of the duty to adhere to the express provisions of the trust agreement. The relevant trust language of the Fourth Amended and Restated Lola Kritchman Revocable Trust Agreement was fairly simple. It stated that during the grantor's lifetime, the trustee was to "pay such sums from principal as [the grantor] may direct."

The facts reflect that during Lola Kritchman's life, she gifted sums of money to her cousin's grandson, Hunter Wolk, for his private school education for seven years through high school and for two years of college at Yale University. This gift was funded by assets in her trust.

On Apr. 17, 2010, Mrs. Kritchman wrote a letter to the trust officer at Wells Fargo, advising the trust officer of her past gifts to Wolk for his education. The letter contained a directive with respect to Wolk's future educational funding, as follows:

> As you know, I have agreed to pay for Hunter's college education at Yale, as I have for the last two years. Thank you for your assistance with the logistics. He will be beginning his junior year in September 2010 and his senior year in 2011. *Please make arrangements so that his costs will be paid for those 2 years as well.* The cost for his junior year is forty nine thousand eight hundred dollars, which you will see when the school sends its documentation in the next month or so.

In compliance with this directive, the trustee Wells Fargo paid for the first semester of Wolk's junior year. Mrs. Kritchman died on Nov. 8, 2010. On Nov. 23, 2010, the trust officer from Wells Fargo sent an email to Wolk's mother advising that the money for the second semester of Wolk's junior year would be paid at the end of November 2010. No other sums were distributed, however. After the grantor's death, for reasons not clearly stated in the opinion, the co-trustees chose not to follow her directive and failed to pay for the three remaining semesters at Yale.

Diane Zuckerman

Wolk filed a four-count complaint against co-trustees William Kritchman and Wells Fargo. It alleged breach of written contract, breach of oral contract, promissory estoppel and breach of trust.

The trial court concluded that the trustees were obligated to follow the written directive of Apr. 17, 2010, to pay for the tuition, room and board for Wolk's last three semesters at Yale. Indeed, the court held such failure to pay on the obligation violated three statutory provisions: § 736.0801, Florida Statutes, providing the duty to administer the trust in good faith; § 736.0803, providing a duty to act impartially among beneficiaries; and § 736.0804, providing the duty to administer the trust in accordance with its purposes, terms and distribution requirements.

The trial court granted judgment for Wolk on the breach of oral contract for the unpaid room, tuition and board in the amount of $85,526.76 plus prejudgment interest. The trial court further awarded damages on the breach of trust claim, also for unpaid room, tuition and board, plus other college expenses including books and health insurance. This award was for $101,491.93. The trial court found that the breach of written contract and promissory estoppel counts were duplicative and granted summary judgment on those counts for trustees Wells Fargo and William Kritchman. Further, the court ordered disgorgement of any attorney's fees and costs paid from the trust, either to or for the benefit of the co-trustees.

The appellate court affirmed the trial court, found the award of damages to be duplicative and reduced the amount of damages to $85,526.76 plus prejudgment interest, which reflected the tuition, room and board amount for the three semesters. It also affirmed the trial court's ruling for disgorgement of the trustees' attorney's fees, which had been paid from the trust's assets.

As a practice tip, one should remain cognizant of the trustee's duties under Chapter 736 and advise clients accordingly. If a trust agreement is not adhered to and a beneficiary is harmed as a result, then such beneficiary will likely be entitled to damages.

Involuntary dismissal, guardianship

H. Lee Mills, Appellant, v. Helen M. Mills, Appellee, Case No. 1D13-2152 (Fla. 1st DCA, 2014)

This case addresses procedural issues involving involuntary dismissal of an incapacity proceeding.

A petition to determine incapacity of Helen Mills was filed by her son. At trial, the petitioner called a number of witnesses to testify in support of a finding of incapacity. At the end of petitioner's case in chief, Helen Mills moved for an involuntary dismissal, arguing that the petitioner had not met the burden of showing by clear and convincing evidence that she was incapacitated. The trial judge agreed and dismissed the incapacity petition, and the appeal followed.

The First District found that the trial court had erred by applying the wrong standard for involuntary dismissal, explaining that for granting and denying a motion for involuntary dismissal, the correct standard is competent substantial evidence. In other words, if the petitioner provided competent substantial evidence in the case in chief, then involuntary dismissal should have been denied.

The appellate court also noted that it was improper for the trial judge to weigh the evidence at the conclusion of the petitioner's case, but rather must evaluate all the evidence after both sides have presented their cases. The court cited to *Tillman v. Baskin*, 260 So. 2d. 509 (Fla. 1972), for the proposition that it is improper for a trial judge to rule on a defendant's motion for involuntary dismissal following the presentation of a prima facie case by the plaintiff.

This ruling implies that a motion for involuntary dismissal in a guardianship case should not be entertained until the conclusion of the case. If there is such a motion, however, this case will be useful in helping to defeat it.

Probate, wills, payable on death and joint accounts

Joseph H. Brown, Appellant, v. Frank Brown, Jr., Appellee, Case No.1D13-4452 (Fla. 1st DCA, 2014)

Elizabeth M. Brown died testate with a will directing that her assets be distributed equally among her children. The appellant filed a declaratory judgment with respect to five bank accounts, two of which were held jointly by the decedent and the appellant and three of which were designated as payable on death to individual beneficiaries.

An evidentiary hearing was held before a magistrate. The evidence centered on whether Mrs. Brown intended that all her children share in these funds, despite the title of the accounts that held them. The magistrate relied on § 655.79, Florida Statutes, that the presumption of survivorship in a joint deposit account can be overcome with clear and convincing evidence of contrary intent.

The trial court found that "Appellee has demonstrated by clear and convincing evidence, which includes the admission of Defendant, that the decedent's intent was for her 'cash accounts,' including her certificates of deposit, to be first used to pay expenses associated with her death and the balance to be divided equally among her six children." The magistrate recommended that all the account funds be deposited into the estate account, and such recommendation was adopted by the circuit judge.

The appellate court, noting that the standard was abuse of discretion, also relied on § 655.79 in its partial reversal. That statute provides in relevant part:

> 655.79 Deposits and accounts in two or more names; presumption as to vesting on death.
>
> (1) Unless otherwise expressly provided in a contract, agreement, or signature card executed in connection with the opening or maintenance of an account, including a certificate of deposit, a deposit account in the names of two or more persons shall be presumed to have been intended by such persons to provide that, upon the death of any one of them, all rights, title, interest, and claim in, to and in respect of such deposit account … vest in the surviving person or persons … .
>
> (2) The presumption created in this section may be overcome only by proof of fraud or undue influence or clear and convincing proof of contrary intent … .

The appellate court affirmed as to the two joint accounts, but found that applicable statute governing the payable on death accounts was § 655.82. That statute provides that "on the death of the sole party or the last survivor of two parties, sums on deposit belong to the surviving beneficiary or beneficiaries." It does not contain a rebuttable presumption clause similar to § 655.79. Accordingly, because the wrong statute was applied, the appellate court reversed as to the payable on death accounts.

Many of us are familiar with such a scenario as presented here, where bank accounts are titled in a manner that conflicts with the testamentary intent expressed in the will. This case can be used as a tool, if the legal standard is met, to rebut the statutory presumption of survivorship in joint accounts.

Fair Hearings Reported

by Diana Coen Zolner


Diana Coen Zolner

***Petitioner v. Respondent (DCF Dade)*, Appeal No. 11F-00065 (May 31, 2011)**

The petitioner is appealing the denial by the respondent of Institutional Care Program (ICP) benefits, due to the lack of a level of care (LOC) determination.

The petitioner had been a resident of the nursing facility since Mar. 25, 2010. On Apr. 2, 2010, a Level I screening was conducted by the facility, and it was determined that a Level II determination was required due to the petitioner's mental illness. On Apr. 9, 2010, the petitioner applied for ICP benefits, and the director of the facility was designated as the petitioner's representative for the application process. Subsequently, the nursing facility was notified on Sept. 14, 2010, Oct. 2, 2010, and Oct. 13, 2010, of missing documentation needed to complete the LOC determination for the petitioner. The respondent acknowledged receipt of the documents requested on Sept. 14 and Oct. 2; however, no evidence was provided that the nursing home provided all of the documents requested on Oct. 13. The information requested included documentation as to the resident's reported history, including psychiatric/psychological assessments and current nursing and social services notes that indicated the resident's mood and behavior. The last request from the respondent stated that the information requested "should be faxed as quickly as possible, but not later than by close of business on 10-13-2010." The nursing facility left telephone messages for the respondent on Oct. 12, 2010, and Oct. 13, 2010. No other evidence of attempts to contact the respondent or to send further requested documentation was presented at the hearing. On Dec. 27, 2010, the Department of Elder Affairs CARES unit provided the nursing facility with a notification of level of care indicating that the petitioner did not meet LOC because "... no evidence [was] provided supporting medical necessity for ... services on a 24/7 basis. No need for assistance at any level."

In accordance with Fla. Admin. Code § 65-2.060(1), the burden of proof was assigned to the petitioner. The ACCESS Policy Manual sets forth appropriate placement and who determines placement in passages 1440.1300 (Appropriate Placement (MSSI)) and 1440.1302 (Who Determines Need for Placement (MSSI)), the pertinent parts of which state:

> To qualify for the Institutional Care Program (ICP), ... the individual must meet special institutional eligibility criteria, including "appropriate placement."
>
> Appropriate placement means that an individual must be placed in a facility or program certified to provide the type and level of care the Department has determined the individual requires.
>
> Two basic requirements must be met for placement to be considered appropriate. These are:
>
> 1) the person must be determined by the Department to be medically in need of the type of care provided by the specific program; and
>
> 2) the person must be actually receiving the services (or for HCBS, must be enrolled in the waiver) which the Department has determined that the individual needs.
>
> To be appropriately placed for ICP, a person must have been determined in need of an ICP level of care (by CARES) and actually be placed in a medical facility which provides the specified level of care.

The Code of Federal Regulations at 42 C.F.R. § 483.128 sets forth the rule for preadmission screening and annual review for mental illness. The code defines a Level I determination as the identification of individuals with mental illness as defined in Sec. 483.102. Level II is the function of evaluating and determining whether nursing facility services and specialized services are needed. This section of the code goes on to state detailed criteria for the evaluation and the documentation used to determine level of care. Additionally, C.F.R. § 483.112 sets forth the rule for preadmission screening for applicants of admission to nursing facilities, in pertinent part, as follows:

> 1) The appropriate State authority must determine, in accordance with § 483.128, whether because of the resident's physical and mental condition, the individual requires the level of services provided by a nursing facility;
>
> 2) If it is determined that the individual needs nursing facility level of care, then the State authority must then determine if specialized care is required; and
>
> 3) A preadmission screening must be made in writing within an annual average of 7 to 9 working days of the referral of the individual to the agency who makes the Level I identification under § 483.128(a) of this part, to the State authority for Level II screening.

Based on the above governing authorities, the nursing facility staff screens the resident for the presence of mental illness. Once the individual has been determined to have mental illness, the individual is referred to an APS Healthcare staff member who screens the individual to determine need for nursing home care. The APS Healthcare staff then gives the resident a LOC determination that is forwarded to the CARES staff. The APS Healthcare staff's decision hinges upon the receipt of required documents from the nursing facility. The respondent's decision to approve ICP benefits is based on the LOC decision received through CARES, which originates from the APS Healthcare staff. In this matter, the respondent contended that the nursing facility was responsible for providing the required documentation to APS Healthcare in order for a LOC determination to be made and that without the APS decision on LOC, the respondent was unable to approve ICP benefits.

The hearing officer determined, based on the above cited authorities and the evidence presented, that the respondent's action to deny ICP benefits as of Apr. 2, 2010, was within the rules of the program because no LOC determination was received by them. Although the petitioner argued that there was a lack of communication between its office and APS Healthcare, no evidence was presented at the hearing to indicate that APS Healthcare's final request for documents on Oct. 13, 2010, resulted in documents being provided. Therefore, the hearing officer concluded that the respondent's action in denying ICP benefits was correct, and the denial was upheld.

Petitioner v. Respondent (DCF Orange), Appeal No. 11F-00850 (May 6, 2011)

At issue in this matter is whether an SSI (supplemental security income)-Related Medicaid Institutional Care Program (ICP) denial of benefits was correct based on the absence of income verification.

The petitioner applied for SSI-Related Medicaid ICP benefits on Jan. 3, 2011. At that time she claimed income from four resources. The respondent requested more information about the petitioner's income sources as part of the eligibility review. At the time of the hearing, all income sources were satisfactorily verified except for one pension. This particular pension was deposited into the petitioner's bank account in differing amounts each month. All amounts were in excess of $500, and foreign exchange rates were presumed to be the cause of the fluctuation in the amounts. The petitioner provided her U.S. bank deposit information as verification of the pension income; however, the respondent rejected same and requested verification directly from the income source.

The petitioner thought she adequately attempted to verify the income source as a result of the following efforts: 1) a representative, on the petitioner's behalf, made telephone inquiries to the income source, but all efforts were unsuccessful due to language and telephone system barriers; and 2) a written request was sent to the income source by the petitioner's representative stating as follows: "I am writing to inform you that I have recently changed my address. Attached is my information along with my new address. I am requesting for medical purposes information on the amount I am to receive along with how long my pension is to last." There was no other documentation of income verification inquiries or of further follow-up efforts by the petitioner's advocate to obtain further information from the income source.

The respondent urged the petitioner to reapply for benefits so that the problem could be fully remedied. The respondent further advised the petitioner that reapplication could occur while the appeal was underway and that there was a three-month retroactive option where eligibility could be authorized for three months retroactive to the new application date. However, the petitioner's representative was concerned that the appeal process would somehow be an obstacle to the reapplication process and did not reapply. It was noted in the opinion that there is no rule or regulation that should cause the appeal process and/or hearing to be an obstacle to an eligibility determination or reapplication.

The burden of proof in this matter was assigned to the petitioner. The hearing officer noted in his/her conclusion of law that "[i]ncome is a significant factor for adult Medicaid in the SSI-Related programs such as ICP as set forth in Federal Regulations 20 C.F.R. §§ 416.1100, 416.1121, and 416.1123." In view of these federal requirements, the hearing officer noted that income source is critical as "it is necessary to know what the income is and what types of deductions (if any) occur and whether the state should include 'more or less of your unearned income than you actually received.'"

The hearing office relied on Fla. Admin Code 65A-1.205 and the ACCESS Policy Manual 165-22, passage 1840.0123, in determining the respondent's denial was reasonable and justified at the time. Fla. Admin Code 65A-1.205 states in pertinent part that:

> If the eligibility specialist determines ... that the applicant must provide additional information for verification ... the eligibility specialist must give the applicant written notice to provide the requested information ... [f]or all programs, verifications are due ten calendar days from request or 30 days from the date of application, whichever is later. ... If the applicant does not provide the required verifications ... by the deadline date the application will be denied, unless the applicant requests and extension or there are extenuating circumstances justifying and additional extension. The eligibility specialist makes the decision of whether to grant the request for extension.

Furthermore, the ACCESS Policy Manual 165-22, passage 1840.0123, states:

> Income must be documented by the source. A verbal statement from a suitable source as to the amount of income, amount and types of any deductions, frequency of receipt, and date of anticipated increases can be accepted when documentation is not available. Examination of a check or bank deposit is not sufficient for verification, because these do not necessarily include deductions.

The hearing officer determined there was no finding of "extenuating circumstances" or of requests for extensions to attempt further verification efforts. The officer further

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determined that the document sent to the pension source was insufficient to address the verification requirement. The hearing officer also concluded that the above ACCESS policy was a reasonable interpretation of the controlling authorities, in view of the federal explanation that income may be counted as either "more or less" than a person receives and that the amount deposited into a bank account is not necessarily a reliable indicator of what the exact income is from the source. Additionally, this particular situation was complicated by fluctuations in the foreign exchange rates.

The hearing office further noted that the situation could have been remedied by the petitioner promptly filing a new application and participating in a more meaningful income verification effort. Additionally, the petitioner could have informed the department of any problems in obtaining adequate verification and could have requested an extension if obstacles were encountered after viable efforts were made to obtain income information from the source. The rule provides for "extenuating circumstances" and "extension" of time. In this situation, there were no extenuating circumstances found, and there were no requests for an extension of time. As a result, the hearing officer concluded that the respondent's encouragement for reapplication and the denial of ICP benefits were reasonable and justified.

***Petitioner v. Respondent (DCF Polk)*, Appeal No. 12F-01458 (March, 2012)**

The issue at hand is whether the petitioner established good cause to change his Medicaid managed care plan prior to open enrollment.

The petitioner, a minor who was represented at the hearing by his father, was enrolled with a managed care provider beyond the period in which he could voluntarily disenroll and sought disenrollment from the plan with immediate enrollment in United, another Medicaid managed care plan. The petitioner's grievance was related to difficulty in finding a pediatric urologist specialist within the current plan. The petitioner was not currently seeing a pediatric urologist, but he needed to begin treatment with a specialist. The respondent provided a list of seven pediatric urologists who were located between 29.2 and 49.7 miles from the petitioner's residence, with travel time of less than 60 minutes each way. The petitioner was dissatisfied with the travel time and argued that United had pediatric urologist specialists available locally with less travel time. The petitioner also argued that the requirement to submit additional documentation prior to seeing a separate physician was unreasonable. He contended that the lack of availability of a local specialist and the request to submit additional documentation established good cause for his immediate disenrollment.

On the other hand, the managed care contract with the respondent provided that "[a]ll participating specialists and ancillary providers must be within an average of sixty (60) minutes travel time from any enrollee's residence." The respondent argued that specialists were available within the 60-minute travel time from the petitioner's residence and were therefore available to the petitioner as permitted by the contract. The respondent further argued that no good cause was shown for the petitioner's early disenrollment.

Florida Statute § 409.969(2) provides in pertinent part:

> After a recipient has enrolled in a managed care plan, the recipient shall have 90 days to voluntarily disenroll and select another plan. After 90 days, no further changes may be made except for good cause ... the term "good cause" includes, but is not limited to, poor quality of care, lack of access to necessary specialty services, an unreasonable delay or denial of service, or fraudulent enrollment ...

After considering the evidence and relevant laws, the hearing officer concluded that the petitioner had not met his burden of proof that the respondent's action was in error. The petitioner's current managed care contract requires the plan to have specialists within 60 minutes of travel time from the petitioner's residence, and the respondent submitted evidence establishing that such specialists were available. Although the travel time provided by the contract may have been an inconvenience, the petitioner had access to specialists in compliance with the contract. Furthermore, Florida law allows Medicaid managed care plans to implement a prior service authorization process whereby the plan may request additional documentation prior to giving authorization to see a physician. In the instant case, the petitioner's argument did not demonstrate that he suffered substantial and unreasonable delay in seeing a physician.

Fair Hearings Reported

The Elder Law Section is proud to introduce

the new indexed and searchable Fair Hearings Reported

This project was made possible, in part, by the generous "Platinum" sponsorship of

The Center for Special Needs Trust Administration, Inc.

The project is designed to index the most current reports from DCF and then work backward through the previous years until the entire database is indexed and searchable. Sample indexes:

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Faulty Notice

Medicaid Denials

Burden of Proof

Excess Assets/Resources

Determining Asset Value

Information Insufficient to Establish Eligibility

Failure to Properly Fund QIT

Medicaid Overpayment

Failure to Report

Collection Procedures

Register for an annual subscription with the form on the back page. You will be sent a password and can begin your search the same day! For more information, contact Arlee J. Colman at *acolman@flabar.org* or 850/561-5625.

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