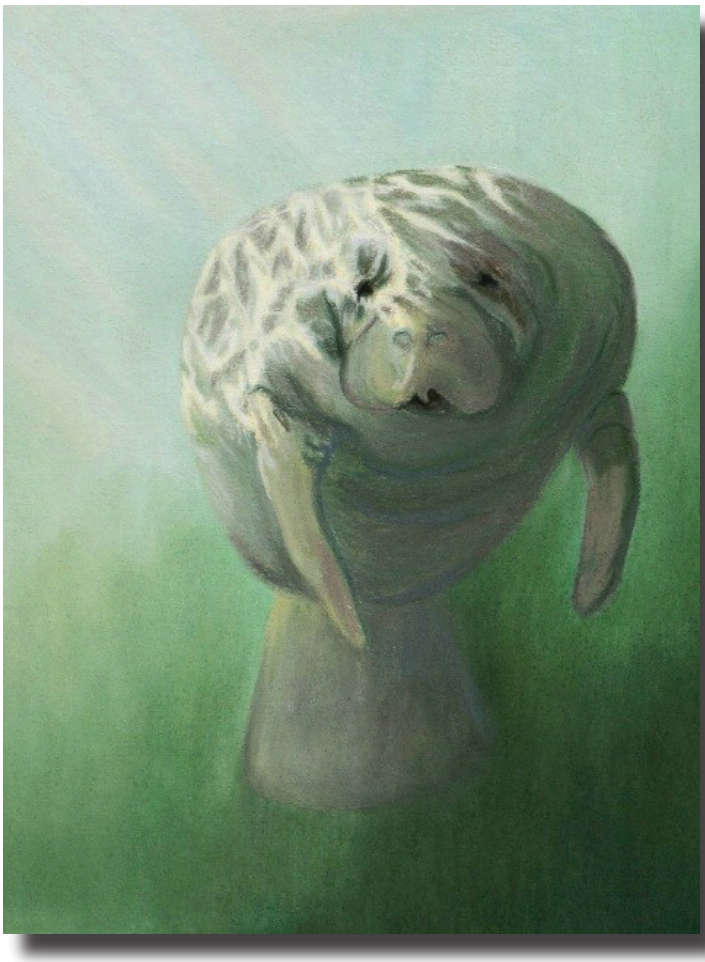
The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"



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The deadline for the SPRING ISSUE is March 1, 2010. 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 Patricia I. "Tish" Taylor, Esquire, *pit@mcsumm.com*, or call Arlee Colman at 800/342-8060, ext. 5625, for additional information.

The Elder Law Section's newest identity crisis

Babette B. Bach

Message from the chair

In June, during my first Executive Council meeting as section chair, **David Lillesand** made a bold motion. He moved to rename the Elder Law Section to the "Elder and Disability Section of The Florida Bar." Wow, I thought, how typical of David to present the most controversial and provocative item possible for my tenure. Instantly I knew it was going to be an interesting year. The sparks have been flying.

I employed the time honored tradition of all flabbergasted leaders; I appointed an ad hoc committee to study the motion. I appointed **Len Mondschein**, chair-elect of the section, and **David Lillesand** as co-chairs of the committee after it became clear they held opposing views.

The purpose of the ad hoc committee is to study whether or not it will be in the best interest of the Elder Law Section to change our name to the Elder and Disability Section of The Florida Bar. I have asked the committee to study the pros and cons of this issue and to present its results at our Executive Council meeting on Jan. 14 in Orlando. At that time, the committee will present its recommendation along with its analysis. This will enable the Executive Council to have a thorough investigation prior to voting on the motion.

The Name Change Committee consists of a stellar group of past and present leaders of the Elder Law Section and includes **Len Mondschein**, **David Lillesand**, **Linda Chamberlain** (past chair, 2008), **Emma Hemness** (past chair, 2007), **John Staunton** (past chair, 2006), **Chris Likens** (past chair, 2005), **Scott Solkoff** (past chair, 2004), **Charlie Robinson** (past chair, 1997), **Ira Wiesner** (past chair, 1993), **Alice Reiter Feld** (past president of AFELA), **Enrique Zamora** (current administrative chair), **Twyla Sketchley** (current substantive chair), **Robert Morgan** (current treasurer), **Greg Glenn** (developmental disabilities committee chair), **Carolyn Landon** (guardianship committee co-chair) and **Marty Cohen** (tax guru).

I can't thank the committee members enough for coming forward and offering their time, experience and wisdom. The committee has held frequent meetings via phone and has generated almost 300 emails since its inception in June. Some have been rather colorful.

Because this has been so controversial, I have requested an opinion from Bar Counsel Paul Hill as to the correct voting procedures. This vote promises to be monumental and will require approval by the Board of Governors of The Florida Bar. If we vote for the name change, we are embracing a new core area of practice and are inviting into our section approximately 1,500 Florida attorneys who practice social security disability cases. (There are currently 1,532 members of the Elder Law Section.) This would be a profound change. There is also a compelling sense that this opportunity may not be available later if it is rejected. There is an uncomfortable sense of urgency as well as discord.

I invite all section members to attend this important Executive Council meeting and to make your views heard. We will provide time for members' comments before the Executive Council votes. We ask that each member limit his or her comments to two minutes so we can accommodate everyone who wishes to speak. (Please note, while section members are welcome to attend the meeting and to express their views, only council members are eligible to vote on this matter.)

Some committee members have suggested that more time is needed. As chair, I believe six months is adequate time to analyze the pros and cons of this proposal. Given the caliber of the committee and its diligent meeting schedule, I doubt that more time would produce new concepts. Delaying the decision process only paralyzes our section. We have this wonderful opportunity to think critically about who we are and what we are all about. The last five months has produced some extremely eloquent and insightful discussions.

It is not the role of the committee members to lobby or cajole or persuade one another. It is the committee's job to present both sides before the vote.

I believe every section member has an opinion on this issue and almost every member cares deeply about the outcome. I have asked the committee to present its recommendation and the pros and cons of this proposal in writing by the end of December so this information can be posted on our website and emailed to all section members.

This is a vote about our mission and our future direction. It will be contentious. May the best interest of our section prevail.

Regardless of the outcome, we will thrive only if we remain that special kind of section whose members unconditionally support one another and advance our clients' interests over and above competition with our colleagues.

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Tax-free planning opportunity for long-term care expenses

by Marc J. Soss, Esq.


M. SOSS

The aging demographics of the United States coupled with the Pension and Recovery Act of 2006 (PPA) and the Deficit Reduction Act of 2007 (DRA) have provided an excellent planning opportunity to create tax efficient vehicles to solve a client's long-term care planning needs. Beginning on Jan. 1, 2010, a tax-free planning option will become available for individuals who desire to provide for long-term medical care by using an existing annuity or life insurance contract purchased after 1996. While not a new concept (it dates back to 1997), the 2010 tax-free planning opportunity may be beneficial to an individual with a larger than needed life insurance policy death benefit, unaffordable monthly or annual premiums, an underperforming or matured deferred annuity contract or the desire to incorporate long-term medical care into his or her estate plan.

Under the PPA's provisions, annuity funds may be withdrawn completely tax-free on a FIFO (first-in, first-out) basis for long-term care benefits (amending Section 72(e) of the Internal Revenue Code). The PPA also includes a "1035 exchange" option that allows for the tax-free and penalty-free basis withdrawal of the entire annuity value for qualified long-term care expenses. However, no income tax deduction will be allowed for any payment made from the cash surrender value of a life insurance contract or the cash value of an annuity contract for coverage under a qualified long-term care insurance contract (Section 213(a) of the Code).

This benefit is further enhanced by the modification of the Medicaid "look back" period from 32 months to 60 months for transferred assets and the authority for all states to adopt "partnership long-term care insurance plans" under the DRA. The qualified partnership plans allow an insured to "exclude an amount of assets equal to the value of the benefits purchased in a long-term care partnership policy from Medicaid qualification."

Implications

The benefits of converting an existing annuity or life insurance contract include 1) no surrender charge will apply to account withdrawals for qualifying long-term care expenses; 2) withdrawals for qualifying long-term care expenses will be categorized as a tax-free reduction of basis; 3) a spouse can be added to a policy for long-term care purposes; 4) 10 percent free withdrawal provision for non-long-term contract withdrawals; 5) ability to purchase an optional lifetime long-term care provision with guaranteed premiums; and 6) the annuity's cash will remain available if the long-term care portion of the policy is never used. However, the conversion will also result in 1) the commencement of a new surrender charge period for the contract; 2) medical underwriting (at a time when the individual's health may be declining); 3) health care benefits that are limited in scope and to a specified number of years; and 4) the cost of the long-term care rider reducing the annuity's tax-deferred income stream. In addition, the typical policy will contain a two-year waiting period from the time the annuity is purchased before benefits can be activated and a 90-day "elimination period" once a claim is filed.

Conclusion

A hybrid policy of this nature should not be used as a substitute for comprehensive long-term care insurance. It is recommended that these policies be used only when an individual can't afford or is uninterested in comprehensive long-term care insurance.

***Marc J. Soss, Esq.**, practices in the areas of estate and tax planning; probate, trust and guardianship administration and litigation; and corporate law in Southwest Florida. He has published numerous articles and has been quoted in Forbes.com, Fox Business, the Naval Reserve Association's magazine, the Rhode Island Bar's magazine,* Bradenton Herald, Lawyers USA *and Military.com.*

Empathy and our role as counselors

by Brian Street

For those of us who practice in the fields of probate and estate planning, it is a constant reality that our chosen field will necessitate working with distraught and grieving clients. Whether they are anticipating or in the process of grieving the loss of a loved one, ours is a practice that frequently touches upon the edges of an inevitable human condition: death. It is, therefore, a field that requires the touch of compassion to accompany our legal counsel.

Although the nomenclature of our chosen field relates technically to our role as counselors at law, it is important to remember that we occupy positions of trust and confidence with our emotionally vulnerable clients that often transcend that of pragmatic advisor and legal advocate. Ours is also a profession of general advice and counsel, and one that often requires the touch of sympathetic humanity—the kindness of a soft word or the loan of a friendly ear.

Our field is one colored by grief and loss, but also one that can bring great contentment through easing difficult times for our clients. Too often in our roles as litigators or advocates, we lose sight of the fact that ours is as much a helping profession as that of a nurse, a social worker or a doctor. Simply by practicing basic empathy and understanding in going about our professional obligations, we have the unique power to ease anxiety, provide much needed reassurances and take proactive steps to make the passing of a loved one more bearable. We should never lose sight of our ability as well as our moral obligation to take the chance to do so whenever possible.

We can never be nor should we ever attempt to become the sole source of moral and emotional support for our clients; our roles as advisors would be compromised by such a relationship. Boundaries are important and should always be maintained.

But in our daily practice, we should always remember that our role does not require us to be dispassionate or distant—quite the contrary. Our clients, particularly those that come to us for probate or estate planning services, may frequently be looking not only for valuable legal counsel, but also for a basic modicum of empathy and compassion. Through the simple acts of listening to an occasional story or inquiring after the family's well-being after a great loss, we can often provide a feeling of acceptance and understanding that makes these great transitions slightly more bearable for our grieving or anxious clients. Always remember that we have more power to provide peace of mind than we may realize and that a truly empathetic counselor—one who both exhibits compassion and provides valuable, practical legal advice—is an invaluable asset.

Brian Street *graduated from the Florida State University College of Law and practices primarily in real property litigation, probate and estate planning at the Longwood office of Rose, Sundstrom & Bentley LLP. He works frequently with patients and families associated with the local hospice organization and gives educational presentations to hospice patients, friends and families to help ease the legal anxiety that accompanies the passing of a loved one. He can be reached at* bstreet@rsbattorneys.com.

Collier County Women's Bar Association helps others with living wills and health care surrogates

The Collier County Women's Bar Association (CCWBA), through the leadership of Starling Hendriks, has instituted a program to educate and inform low-income individuals about the importance of memorializing their final wishes in the form of a living will as well as designating a surrogate to make health care decisions in the event they are unable.

In conjunction with Legal Aid Services of Collier County (LASCC) and the Neighborhood Health Clinic (NHC) in Naples, the CCWBA is preparing brochures (in English, Spanish and Creole) for distribution to patients of the NHC to educate them about the importance of living wills and designating a health care surrogate.

"Reaching this target group with these critical documents is a tremendous public service," says Elder Law Section member and Florida Bar Board of Governors member Laird A. Lile of Naples.

The organizations plan to hold quarterly legal aid clinics in both the Naples and Immokalee areas to reach out to the general public regarding the importance of advance planning documents. The CCWBA and the LASCC will work in conjunction to recruit volunteer attorneys to meet with individuals one-on-one to discuss these documents and to assist with their preparation. The organizations anticipate reaching 10,000 low-income members of the public.

Mark your calendar

Elder Law Certification Review Course
January 21-22, 2010
Hilton Orlando

Spring Issue ELS Advocate Article Deadline:
March 1, 2010

Rainmaking 101 — Cross-selling

by Mark Powers and Shawn McNalis


M. POWERS


S. MCNALLIS

In this issue we will discuss several ways to market your services to *existing clients*. This is called "cross-selling" and is one of the least expensive marketing options available to you. Why? Because you've already spent the time, money and effort to get these clients in the door—there are minimal marketing costs associated with continuing to serve them, and therefore they are more profitable.

In cross-selling you educate your present and past clientele about your range of services, with the hope that they will want to use more of what you have to offer. This includes clients who might need advanced services in the same practice area you've served them in the past as well as clients who could be served by another practice area altogether.

Cross-selling your client base

Select past clients by looking at your client lists. If your client information is on a database that allows you to sort by given parameters or fields, it will be easy to generate reports or lists of those who meet specific criteria. If you are not that well organized, delegate a staff member to hand sort your files using your list of criteria.

For example, an estate planner could search for past clients that might need advanced estate planning services by sorting through the following criteria: age, asset level, past service provided by the law firm, whether the past client is a business owner, whether it is a family-owned business, etc. Develop similar lists of attributes that are reliable predictors of your clients' needs and then strategize about cross-selling or upgrading these groups. There is a great deal of hidden revenue to uncover in this process.

Once the sorting is complete, the next step is to re-establish communication with the targeted group of clients. There are several ways to do this, but most of our clients find that it is most effective to reconnect with a group by sending a letter. Add as much personalization as you can to your letter to increase its effectiveness—this should include the client's name and perhaps a brief handwritten note that says something like*: "I look forward to hearing from you,"* or *"I have some interesting new tools (or strategies) I'd like to discuss with you."*

Cross-selling letter #1

The following is a sample letter from an elder law attorney informing the client of further services provided

Cross-selling letter #1

Dear _____ (Name):

We at (firm name) enjoyed meeting and working with you on the drafting of your will. We want to take this opportunity to again offer our thanks for your trust in us. In addition to estate planning, our firm has expertise in a wide variety of legal matters including the following:

- Guardianship
- Medicaid & Government Benefits
- Long-Term Care

We would be delighted to assist you in any future matters or transactions in which you may need the assistance of an attorney. We offer an initial half-hour consultation at no charge to you.

Please give us a call if we can be of further assistance.

Sincerely,
(Name)

Cross-selling letter #2

Dear _____ (Name):

The new _____ law is becoming more and more complicated. There are many aspects of it that may affect you (or your interests). Because you have placed your trust and confidence in me in the past, I believe I should keep you informed of changes in the law that may have important consequences for you.

Many people are not making the best use of this law simply because they are uninformed. I believe you should have the opportunity to learn what your options are and how this change affects you.

In order to remedy this situation, I am holding a small, informal information session at my office on _____ at _____. Please join me and get your questions answered. Give us a call at _____ to RSVP.

I look forward to seeing you again.

Sincerely,
(Name)

by the firm and offering a complimentary consultation. This letter is sent as part of the post-closing process— before the relationship with the client fades.

Cross-selling letter #2

This letter invites past clients to a small, informal information session. Typically these information sessions are held in your conference room, accompanied by simple refreshments and involving less than 10 people at a time. You can also let your clients know you will meet with them individually to answer further questions.

Cross-selling letter #3

This letter is for the attorney who is cross-selling within his own client base, but it can be modified to suit cross-selling a client who has worked successfully with one member of a legal firm and is judged to be a candidate for the services of another attorney in the firm.

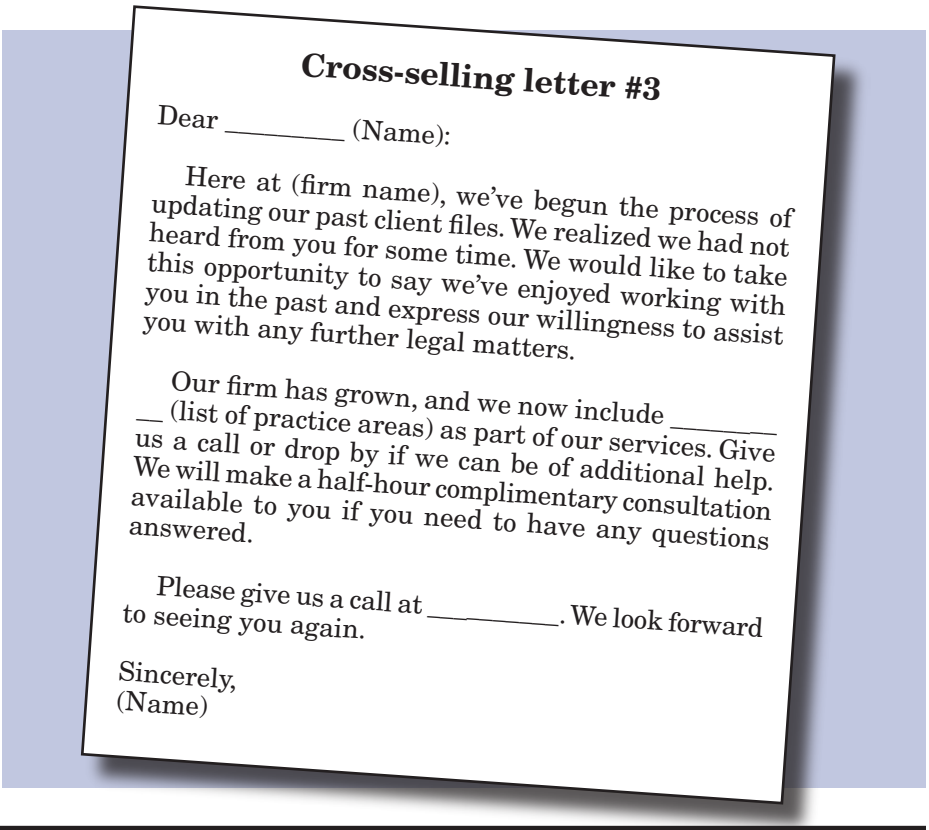
The next step

Compose a customizable form letter inviting your clients to:

- Call and schedule an appointment with you; or
- Attend a small, informational session in your office conference room.

Remember: buried within your client files is a great deal of potential business. It is up to you to access it. Cross-selling is one of the easiest, least expensive and most ethical ways to market your services.

Mark Powers *is president of Atticus Inc. and co-authored with Shawn McNalis* The Making of a Rainmaker: An Ethical Approach to Marketing for Solo and Small Firm Practitioners. *Both are featured marketing writers for* Lawyers, USA. *Powers founded Rainmakers™, a simple process for attorneys at all levels to stay focused on marketing, creating fresh ideas and on-going accountability to marketing. To learn more about Atticus or Rainmakers™, visit the Atticus website at* www.atticusonline.com *or call the Atticus office at 352/383-0490.*



Cross-selling letter #3

Dear _____ (Name):

Here at (firm name), we've begun the process of updating our past client files. We realized we had not heard from you for some time. We would like to take this opportunity to say we've enjoyed working with you in the past and express our willingness to assist you with any further legal matters.

Our firm has grown, and we now include _____ (list of practice areas) as part of our services. Give us a call or drop by if we can be of additional help. We will make a half-hour complimentary consultation available to you if you need to have any questions answered.

Please give us a call at _____. We look forward to seeing you again.

Sincerely,
(Name)

ANNOUNCING

The Endowed Pooled Trust for Public Guardianship

THIS DECLARATION OF TRUST is made this 30th day of June 2009, by The Center For Special Needs Trust Administration, Inc., a Non-Profit Corporation organized under the laws of the State of Florida (the "Center"), according to the following terms herein:

WHEREAS, the Center has established a variety of operating pooled trusts pursuant to U.S.C. § 1396p and has extensive experience in the administration of such trusts;

WHEREAS, the Center has also established a history of supporting agencies and programs that relieve the societal burden of indigent guardianship;

WHEREAS, the Center has frequently used the pooled trusts under its administration to further its objective of relieving the societal burden of indigent guardianship;

WHEREAS, the Center now wishes to establish a new pooled trust that is specifically conceived to continuing the goal of relieving the societal burden of indigent guardianship; and,

WHEREAS, the Center also wishes to create a corresponding endowment fund that will complement this new pooled trust by being administered consistently with the objective of relieving the societal burden of indigent guardianship.

NOW THEREFORE, the Endowed Pooled Trust for Public Guardianship is hereby established.

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Member news

Helen Von Dolteren-Fournier receives accreditation

Helen Von Dolteren-Fournier, Esq., has been accredited for the preparation, presentation and prosecution of claims for veteran benefits before the Department of Veterans Affairs. Von Dolteren-Fournier is a founding partner of AEGIS Law Firm PL in Winter Park. She practices in all areas of estate planning, which includes Medicaid planning.

Amy Fanzlaw has dual certification

Amy J. Fanzlaw recently became one of only seven attorneys in Florida to achieve dual board certification by The Florida Bar in both wills, trusts and estates and in elder law. She serves as president of the Craig S. Barnard American Inn of Court LIV in West Palm Beach and was selected for inclusion in *Florida Super Lawyers—Rising Stars Edition 2009*. She practices law in Boca Raton.

Stetson's elder law scholar Rebecca Morgan receives Treat Award

R. MORGAN

Stetson University College of Law's Professor Rebecca C. Morgan has been awarded this year's prestigious Treat Award for Excellence by the National College of Probate Judges. The award was presented Oct. 2 at the annual National College of Probate Judges meeting in Maine. Professor Morgan directs Stetson's Center for Excellence in Elder Law and is the Boston Asset Management Faculty Chair in Elder Law, the first faculty chair in elder law in the country.

L. WALDOCH

J. MCCONNAUGHHAY

McConnaughhay Law Group has big year

We've had a big year! McConnaughhay Law Group PA is proud to announce that the firm's name has changed to Waldoch and McConnaughhay PA. Lauchlin Tench Waldoch was recognized for being board certified in elder law for 10 years, and Jana E. McConnaughhay was board certified by The Florida Bar in elder law.

A. REITER FELD

Alice Reiter Feld is featured speaker at educational seminars

Alice Reiter Feld, board certified elder law attorney by The Florida Bar and the National Elder Law Foundation, recently was the featured speaker at the Long Term Care Advisory Council meeting for Vitas Hospice Care in Fort Lauderdale, where she spoke on "Elder Abuse in the Long Term Care Setting." She also served as a featured speaker at the Hospice by the Sea Ethics, Elder Law and Hospice legal education seminar in Boca Raton on "Beyond Wills and Trusts: Elder Law for the Estate Planning Attorney." In addition, Feld was the featured speaker for AARP members in Coconut Creek on the topic of "Five Crucial Mistakes Families Are Making About Medicaid, Veterans Benefits and Long Term Care and What You Can Do to Avoid Them." Finally, in August, she was the featured speaker for the Leukemia and Lymphoma Society Support Group at Memorial Hospital West in Pembroke Pines on "Advance Directives and End of Life Issues." Feld has offices in Tamarac and Delray Beach and is past president of the Academy of Florida Elder Law Attorneys.

Sketchley Law Firm news

T. SKETCHLEY

Twyla Sketchley, a Florida Bar board certified elder law attorney with The Sketchley Law Firm in Tallahassee, presented "How an Emergency Temporary Guardian Can Help Law Enforcement in the Investigation of Crimes Against the Elderly" on Sept. 15 at the Attorney General's Florida Crime Prevention Training Institute's Elder Case Management—Investigation to Prosecution. Sketchley is a member of both The Florida Bar and the State Bar of Montana and is a circuit civil mediator.

Ira Wiesner appointed to elder law panel

I. WEISNER

Board certified elder lawyer Ira Stewart Wiesner of Sarasota recently was appointed to the Law and Aging Committee of the American College of Trust & Estate Law. He is a fellow and former president of the National Academy of Elder Law Attorneys.

Exempt property under the Florida Probate Code:
2009 amendments to Florida Statute §732.402 and statutory exemptions

by Alex Cuello


A, CUELLO

In Florida there is constitutionally exempt property and statutorily exempt property under the Florida Probate Code. Both exemptions provide protection from creditors' claims. One of the more coveted exemptions is the homestead exemption found in Section 4, Article X, of the Florida Constitution. The Florida Probate Code supplements the constitutional exemptions by statutorily including additional assets as exempt from the claims of creditors.[1] "This statute is intended to protect the surviving spouse and children by preserving a portion of the decedent's estate against the claims of unsecured creditors."[2] Specifically, F.S. §732.402 provides that "[i]f a decedent was domiciled in this state at the time of death, the surviving spouse, or, if there is no surviving spouse, the children of the decedent shall have the right to a share of the estate of the decedent … being designated 'exempt property.'"

During the 2009 Florida Legislative Session, CS/HB 599 was passed and signed into law by Governor Crist amending F.S. §732.402. The amendments revise criteria for certain household items, motor vehicles and tuition programs as exempt.[3] The act's effective date is July 1, 2009.[4]

The household furnishing exemption was doubled. As amended, statutorily exempt property shall consist of household furniture, furnishings and appliances in the decedent's usual place of abode up to a net value of $20,000 as of the date of death.[5] Just because the household furnishings are found on the date of death at the decedent's usual place of abode does not bring them into the estate. "Section 732.402 is not intended to, and does not, deprive the surviving family members or third parties of their existing rights to personal property within the decedent's home at the time of the decedent's death."[6] However, the personal representative may maintain an action of replevin to recover possession of estate property not voluntarily surrendered upon demand or to determine title to the property.[7]

The automobile exemption is now limited to "two motor vehicles as defined in s.316.003(21), which do not, individually as to either such motor vehicle, have a gross vehicle weight in excess of 15,000 pounds, held in the decedent's name and regularly used by the decedent or members of the decedent's immediate family as their personal motor vehicles."[8] The new statute replaced "automobiles" with "motor vehicle." Section (21) of F.S. §316.003 defines "motor vehicle" as "[a]ny self-propelled vehicle not operated upon rails or guideway, but not including any bicycle, motorized scooter, electric personal assistive mobility device, or moped." Although the Legislature included the statutory definition of "motor vehicle" in the amended act, the limitation of the type of vehicle recognized as exempt is codification of existing case law.[9] In *In Re: Estate of Hazel Cooper Corbin,* 603 So.2d 127 (Fla. 1st DCA 1992), the district court affirmed the trial court's refusal to recognize the decedent's motor home and travel trailer as exempt automobiles under F.S. §732.402(2)(b). The district court relied on the specific statutory language "of subsection (2)(b) exempting those automobiles held in the decedent's name *and regularly* used by the decedent or members of the decedent's immediate family *as their personal automobiles."*[10] The court did recognize that a motor home or a travel trailer could conceivably be used as one's personal vehicle; however, it was not demonstrated on the record before the court.[11]

Under the 2009 act, the exemption of prepaid college board programs was expanded. Prior to CS/HB 599, the statutory exemption was limited to the "Stanley G. Tate Florida Prepaid College Program contracts purchased and Florida College Savings agreements established under part IV of chapter 1009."[12] CS/HB 599 expanded the exemption to "[a]ll qualified tuition programs authorized by s. 529 of the Internal Revenue Code of 1986, as amended, including, but, not limited to, the Florida Prepaid College Trust Fund advance payment contracts under s. 1009.98 and the Florida Prepaid College Trust Fund participation agreements under s. 1009.981."[13]

F.S. §732.402 also contains a "catch all" exemption provision that is often overlooked. Under F.S. §732.402(4), "[e]xempt property shall be in addition to protected homestead, statutory exemptions, and property passing under the decedent's will or by intestate succession." The "statutory exemptions" portion of the act brings all other statutorily exempt property under the umbrella of F.S. §732.402. For instance, under the Florida Workers' Compensation Act, specifically F.S. §440.22,

> No assignment, release, or commutation of compensation or benefits due or payable under this chapter except as provided by this chapter shall be valid, and such compensation and benefits shall be exempt from all claims of creditors, and from levy, execution, and attachments or other remedy for recovery or collection of a debt, ***which exemption may not be waived***. However, the exemption of workers' compensation claims from creditors does not extend to claims based on an award of child support or alimony. (emphasis added)

continued, next page

Exempt property
from preceding page

The exemptions from claims of creditors to funds identified as workers' compensation benefits remain exempt in the hand of the beneficiary.[14] "[T]he exemption in section 440.22 applies to workers' compensation benefits received by the beneficiary and deposited in a bank account, so long as the funds are traceable to the workers' compensation benefits."[15]

Additional statutory exemptions include wages from garnishment;[16] life insurance policies;[17] cash surrender value of life insurance policies and annuity contracts;[18] wages or unemployment compensation;[19] disability income benefits;[20] pension money and certain tax exempt funds;[21] assets in qualified tuition programs, medical savings accounts, Coverdell education saving accounts and hurricane savings accounts;[22] and "a debtor's interest in personal property, not to exceed $4,000.00, if the debtor does not claim or receive the benefits of homestead exemption under s. 4, Art. X, of the State Constitution."[23] However, many exemptions do not extend to debt owed for child support or spousal support.[24]

Summary

Changes made to F.S. §732.402 took effect July 1, 2009. The changes increased the exemption amount of household furniture, furnishings and appliances in the decedent's usual place of abode up to a net value of $20,000, limited the number of motor vehicles that may be determined exempt to two, codified the case law definition of "motor vehicle" that may be determined exempt property in probate proceedings and expanded prepaid college board programs. There are additional statutory entitlements for determining other assets exempt from creditors' claims and preserving them for the surviving spouse and decedent's children. The personal representative or person claiming entitlement to the exempt property should always file a petition to determine exempt property within the statutory time period and secure an order authorizing the personal representative to release the property to the proper person.

Alex Cuello *is the principal shareholder at the Law Office of Alex Cuello PA. He practices in the areas of elder law, probate and guardianship administration, litigation and social security. He received his LL.M. in elder law from Stetson University, J.D. from St. Thomas University and B.A. from Florida International University.*

Endnotes:

1 Fla. Stat. §732.402
2 *In Re: Estate of Grant*, 558 So.2d 208, 209 (Fla. 2nd DCA 1990) citing Fla. Stat. §732.402(6) (1987).
3 CS/HB 599.
4 *Id.*
5 Fla. Stat. §732.402(2)(a) (2009).
6 *In Re: Estate of Grant*, 558 So.2d 208, 209 (Fla. 2nd DCA 1990) citing Fla. Stat. §732.402(6) (1987).
7 *Id.*
8 Fla. Stat. §732.402(2)(b) (2009).
9 *In Re: Estate of Hazel Copper Corbin*, 603 So.2d 127 (Fla. 1st DCA 1992).
10 *Id.* at 128.
11 *Id.* at 129.
12 Fla. Stat. §732.402(2)(c) (2008).
13 Fla. Stat. §732.402(2)(c) (2009).
14 *Broward v. Jacksonville Medical Center*, 690 So.2d 589 (Fla. 1997).
15 *Id.* at 592.
16 Fla. Stat. §222.11.
17 Fla. Stat. §222.13.
18 Fla. Stat. §222.14.
19 Fla. Stat. §222.15.
20 Fla. Stat. §222.18.
21 Fla. Stat. §222.21.
22 Fla. Stat. §222.22.
23 Fla. Stat. §222.25.
24 *Id.*

An alert regarding the unlicensed practice of law in Florida

Elder law practitioners throughout the state have been receiving increased reports in recent years of possible violations of Florida unlicensed practice of law (UPL) rules. In particular, as the result of the Deficit Reduction Act, insurance agents who previously made their living from the sale of Medicaid qualifying annuities may now be providing services that are very similar to (if not exactly the same as) the services provided by elder law attorneys. The allegations that have been made include the following:

1. Drafting of qualified income trusts by non-attorneys
2. Drafting of personal service contracts by non-attorneys
3. Provision of legal counseling to clients regarding federal and state Medicaid laws by non-attorneys

The only way these allegations will be investigated by The Florida Bar is for someone to file a UPL complaint with The Florida Bar. UPL investigations by The Florida Bar are complaint-driven. Attorneys who become aware of public information, such as a website or marketing materials produced by non-attorney Medicaid planners, which alleges the unlicensed practice of law on its face, can also file a UPL complaint with The Florida Bar. This alert is designed to make elder law practitioners aware of the problem and to encourage you and your clients to report alleged instances of UPL to The Florida Bar. To obtain The Florida Bar's unlicensed practice of law complaint form, visit *www.Floridabar.org/TFB/TFBsources.nsf/attachments/FDCF085CFF9B805985256D7200A40E/$FILE/UPLComplaintForm.pdf?openelement*.

For further information regarding this alert, please contact John R. Frazier J.D., LL.M., at 727/586-3306, ext. 104, or by email at *john@attypip.com*.

Committees keep you current on practice issues

Join one (or more) today!

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

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

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COMMITTEE REPORTS

Mentor Committee

Angela N. Warren, chair

Since January 2009, the Mentor Committee has conducted a Tricks of the Trade teleconference every other month. The telephone conferences are held at 11 a.m. Central/12 noon Eastern and last for one hour. The teleconferences are free to Elder Law Section members. Attendees receive one hour CLE credit for each teleconference. The format for the teleconferences is informal. Each call has one or two mentors leading the discussion. Each mentor speaks for 10 to 15 minutes regarding that day's topic. They give practical tips and advice to the mentees. The remaining teleconference time is then opened up for a question and answer session.

Over the last year, we have had teleconferences on the following topics: guardianships; abuse, neglect and exploitation; special needs trusts; VA benefits; and probate. Possible future topics include ethics, litigation, guardianships for minors/settlements and Social Security.

Special thanks to Twyla Sketchley, Victoria Heuler, Carolyn Sawyer, Jay Hemness, Mary Alice Jackson, Lauchlin Waldoch, Alice Reiter Feld and Steve Quinnell for serving as mentors on our teleconferences!

The Mentor Committee routinely receives requests from attorneys that are new to the practice of Elder Law to be assigned a mentor. The Mentor Committee is seeking volunteers to act as mentors for different practice areas. The idea is to have a list of people a mentee can contact instead of having one mentor assigned to one or more mentees. The list of mentors could then be sent to new attorneys or posted on the Elder Law Section's website. If you are interested in serving as a mentor, please email Angela Warren at *awarren@mcelderlaw.com*. Please include your name, address, telephone number, email address and what practice areas you would like to mentor.

Probate Special Committee

Kara Evans and Sam Boone, co-chairs

The Probate Special Committee is a new committee this year. The committee meets the second Tuesday of each month by phone conference. At each meeting we have a caselaw update followed by a discussion of a topic of interest to our probate practices.

Our first meeting covered *Hays v.*

continued, next page

Lawrence, 1 So. 3rd 1176 (5th DCA, 2009): adversarial probate proceedings are governed by the rules of civil procedure, so file your fee claim within 30 days; *Crescenze v. Bothe,* 4 So. 3rd 31 (2nd DCA, 2009): trust beneficiaries are an indispensible party and should not be denied participation in an action to terminate or revoke a trust; and *Carey v. Rocke,* Case No. D208-4445(2nd DCA, 2009): when a will is voided due to undue influence, the doctrine of relative revocation should be considered because there is a preference for estates to pass via testacy rather than intestacy.

We then discussed the potential pitfalls regarding dealing with upside-down real estate in a probate proceeding. Caution should be urged if the personal representative exercises the option to take possession of the homestead and to secure a lien to the extent probate assets are used to maintain the home. If the home is upside down and the creditor repossesses the property, the personal representative may be subject to claims of wasting the existing probate assets.

We also discussed the need to notice secured creditors. Many secured creditors do not file a claim because they have the option to take the underlying property. Without notice, they can come back and claim against the estate for the difference between the value of the secured property and the amount of the debt. However, if you do notice them and they do not file a claim, then their recovery is limited to the property securing the claim.

Our next issue dealt with the IRS. Homestead protection does not apply versus the IRS. And mailing the notice to creditors to the local IRS or even to the address where the decedent filed his or her tax returns is not an effective way to notice the IRS. So, notice the IRS by serving notice first to the United States Attorney's Office in the county where the probate is located and sending a copy to the United States Attorney's Office in Washington, D.C. See 29 USC 2410.

The committee was loathe to consider the idea of abandoning property since the potential for an attractive nuisance issue was too great.

"There is no FLSSI form for that!" How many times have you been creating your probate forms and realized there was no FLSSI form that covered your issue and so you had to create a form? The Probate Special Committee suspects that many of us create similar forms. We are in the process of collecting common forms for which an FLSSI form does not currently exist. We will be posting them via link on the Elder Law Section's committee webpage. If you have some forms you would like to share, please send them to Kara Evans at *evanskeene@aol.com.* Please put "probate committee" in the subject line.

Probate Special Committee Members

Sam Boone, co-chair
Kara Evans, co-chair
Jerry Colen
Patti Fuller
Carrie Griffin
Daniel Parri
Diane Zuckerman
Wayne K. Ekren
Collett P. Small
Jo Ann Abrams
Elizabeth Mancini
Beverly J. White

UPL Committee

John Frazier, chair

Conference call schedule

If interested in joining a call, please contact the committee chair directly for call-in instructions.

(All calls are held on a Tuesday at 4 p.m.)

Dec. 15, 2009
Jan. 19, 2010
Feb. 16, 2010
Mar. 16, 2010
Apr. 20, 2010
May 18, 2010
June 15, 2010

Join an Elder Law Section committee today

The Elder Law Section's substantive and administrative committees need your brilliance, knowledge and experience.

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- Support for the aging network and special needs citizens in your community and throughout Florida
- Providing technical support to the state Legislature on aging issues
- Opportunity to shape elder law in Florida
- Network of colleagues available to answer questions or provide advice

Email or fax the completed form to Arlee Colman at The Florida Bar at *acolman@flabar.org* or 850/561-5825 or to Twyla Sketchley at *twyla@sketchleylaw.com* or 850/297-2884.

Name:_____

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Please check the committee(s) on which you are interested in serving. Most committees also have subcommittees dedicated to specific issues and projects.

___ Medicaid & Government Benefits
___ Membership
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___ Special Needs Trusts
___ Litigation
___ Guardianship
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The use of the Baker Act and its alternative

by Enrique Zamora, Esq.


E. ZAMORA

A guardian may have to resort to Chapter 394 of the Florida Statutes (known as the Baker Act) in a case where a guardian believes that a ward needs to be committed to a psychiatric facility. Pursuant to F.S. §744.3215(4), a guardian seeking to commit a ward to a psychiatric facility must obtain a specific order to do so or use the formal placement proceedings under Chapter 394. This process is initiated by the guardian obtaining an *ex parte* order for involuntary assessment under F.S. §394.463. Upon the signing of this order, law enforcement officers may take the ward to a psychiatric facility for assessment for up to 72 hours. During this 72-hour period, the administrator of the facility has the opportunity to file a petition for involuntary placement in the court of the county where the patient is located (F.S. §394.467). A hearing before a judge or a magistrate must take place within five days after the filing of the petition for involuntary placement.

Guardians that avail themselves of the provisions of the Baker Act must be familiar with the process to be able to participate and help the assistant state attorney assigned to the case. Guardians should also be aware that an assistant public defender will be assigned to represent the ward. He or she will be a zealous advocate for the ward. Unfortunately, many guardians fail to notify their attorney of the filing of a petition under the Baker Act. It is very important that the attorney for the guardian be notified of the Baker Act proceedings in order to assist the guardian. The guardian should attend the hearing to offer testimony, if required, to prove that the ward meets one of two criteria for involuntary treatment.

Guardians should also consult with their attorney if the facility where the ward is residing suggests using the Baker Act. According to the Supreme Court Commission on Fairness Report, Baker Act proceedings are sometimes abused for financial reasons. The report cites cases involving elders in nursing homes where Baker Act petitions were filed by facilities for monetary gain.

There may be situations in which a Baker Act proceeding can result in the appointment of a guardian advocate for the ward, if the guardian is unable or unwilling to authorize the treatment. Guardians should be aware of this and should be familiar with the role of guardian advocates. A guardian advocate is a person appointed by a court to make decisions regarding mental health treatment on behalf of a patient who has been found incompetent to consent to treatment. The guardian advocate may be granted specific additional powers by written order of the court pursuant to F.S. §394.455(12).

If there is a health care surrogate designation, the court will give preference to the surrogate in the appointment of a guardian advocate (F.S. §394.4598[5]). If a situation presents itself in which there is no health care surrogate, the selection must be made from a priority list, which includes a) the patient's spouse; b) an adult child of the patient; c) a parent of the patient; d) the adult next-of-kin of the patient; e) an adult friend of the patient; or f) an adult trained and willing to serve as guardian advocate for the patient.

A guardian advocate appointed pursuant to Chapter 394 is required to attend a four-hour training course approved by the court. That course must include information regarding the patient's rights, psychotropic medications, diagnosis of mental illnesses, ethics of medical decision-making and duties of guardian advocates.

However, there is an alternative to the Baker Act for guardians who need to commit a ward to a mental facility. The Procedure for Extraordinary Authority, as outlined in F.S. §744.3725, provides for a specific procedure to authorize a guardian to commit a ward to a mental facility without using Chapter 394. It is important to note that pursuant to F.S. §744.3215(4), a guardian may not, among other things, commit a ward to a facility, an institution or a licensed provider without first obtaining specific authority from the court as described in F.S. §744.3725 or through formal placement proceedings pursuant to Chapters 393, 394 or 397.

Under F.S. §744.3725, the court must fulfill the following requirements: 1) appoint an attorney to act on behalf of the incapacitated person and allow the attorney an opportunity to meet with the person and present evidence, to cross examine any witnesses and to have a hearing on the petition under this section; 2) receive as evidence independent medical, psychological and special evaluation with respect to the incapacitated person by competent professionals, or even appoint experts to assist in the evaluation; 3) the court must meet with the incapacitated person to obtain its own impression on the person's incapacity and to afford the incapacitated person the opportunity to present his or her personal views with respect to the judicial proceeding; 4) the court must find, by clear and convincing evidence, that the person lacks capacity to make a decision regarding the issue before the court and that the incapacitated person's capacity is unlikely to change in the future; and 5) the court must be presented with clear and convincing evidence that the authority being requested is in the best interest of the incapacitated person. It is important to point out that the "best interest" standard is followed and not the "substituted judgment" standard, which is usually the preferred standard.

To summarize, guardians must be

aware of the limitations of the right to consent to medical treatment on behalf of a ward when dealing with a ward who suffers from a mental illness and is in need of inpatient treatment at a psychiatric facility. In these cases, there are two options available. The most commonly used is a petition for involuntary treatment pursuant to Chapter 394 (Baker Act). The second option is a Petition for Extraordinary Authority pursuant to F.S. §744.3725.

***Enrique Zamora, Esq.**, a Florida Bar board certified elder law attorney, is a partner with the firm of Zamora & Hillman, with offices in Coconut Grove. His practice focuses in elder law with an emphasis in the areas of probate administration and litigation, guardianship administration and litigation, trusts administration and litigation, and estate planning. He is an adjunct professor at St. Thomas University School of Law, where he teaches elder law. He has acted as special general magistrate, guardian advocate and special public defender in Baker Act and Marchman Act proceedings for the last 13 years. He received his J.D. degree, cum laude, from the University of Miami in 1985.*

SALARIED POSITION AVAILABLE

The Elder Law Section is hiring a qualified individual to serve as our **LEGISLATIVE LIAISON.** The duties and job description of this part-time position are below. Resumes must be received no later than Dec. 15, 2009, and should be sent via email to *emorris@elderlawassociates.com.*

The qualified individual must be competent to

- Assist legislative chair of the ELS, the Joint Public Policy Task Force and AFELA leaders with all legislative issues, including attending all Legislative Committee meetings and all task force calls;
- Analyze upcoming legislation and make recommendations to the Legislative Committee whether to follow, support or oppose bills and write white papers in support of or in opposition to bills, as needed;
- Be available to work in "real time" and be "on call" during legislative session and committee meetings. This includes being available as needed in Tallahassee to meet with legislative staff and legislators and to attend committee hearings;
- Work with and give direction to Ken Plante (lobbyist) and Tom Batchelor (legislative consultant) and improve our utilization of both;
- Assist in drafting any ELS proposed legislation and assist in passage of same;
- Review ELS legislative positions approved by The Florida Bar Board of Governors and draft new positions as needed;
- Identify and delegate tasks to be accomplished and monitor follow-up; and
- Attend ELS and AFELA meetings where legislative updates are on the agenda (Unprogram, Public Benefits Seminar and ELS Retreat, for example).

Give a critical gift to your law practice for the holidays

Your Joint Public Policy Task Force, the partnership between AFELA and the Elder Law Section, needs your contribution NOW to continue to be successful!

The task force is currently:

- Tackling Department of Children and Family policy issues and manual changes;
- Marketing elder law and our members' practices; and
- Lobbying lawmakers on behalf of your practice and your clients.

Task force participants volunteer their time and energy in support of your clients and your practices. To continue to be effective, we must have funds available to pay our administrative law attorney (to represent us in any action against the Department of Children and Families), our lobbyist and our legislative experts (to represent us before the Legislature) and our public relations expert (to make the public aware of your practices and elder law).

Our goal is to have at least $60,000 in pledged contributions for calendar year 2010 by Jan. 15, 2010. Whether you are a first-time contributor or a long-time supporter renewing your contribution for calendar year 2010, your investment will take just a short time, but will pay off quickly and for a long time!

Contributing is easy! Please take a minute now and contact Kari Glisson at *kari@afela.org* or visit *http://tinyurl.com/TaskForcePledgeForm* to make your contribution.

Thank you in advance!

Randy C. Bryan & A. Stephen Kotler, co-chairs
Joint Public Policy Task Force

DD 4-Tiered Waiver implementation impacts aging parents of the developmentally disabled

by Gregory G. Glenn, Esq.

As the baby boomer population ages, more elder law attorneys are being approached for guidance by elderly clients who have developmentally disabled adult children. Due to life circumstances, these parents are becoming more reliant on their children's public benefits to provide funding and care resources they themselves can no longer provide.

The primary public benefits afforded the developmentally disabled in Florida are found in F.S. §393.0661—the Medicaid Developmental Disabilities 4-Tiered Home and Community Based Waiver. The developmental disabilities waivers are promulgated under the Federal Medicaid Home Community Based Waivers at 42 U.S.C. §1396n(C) and are governed by 42 C.F.R. §441.300-.310. In Florida, F.S. §409, F.A.C. 59G-13.080, and F.S. §393 are the corresponding promulgating laws.

This article provides a brief history of the developmental disability waiver and introduces recent cases involving this waiver.

Recent history

Prior to 2007, F.S. 393 defined two waivers specific to the developmentally disabled: 1) the Developmental Disabilities Waiver (aka, the "Big Waiver"); and 2) the Family Supported Living Waiver (aka, the "Little Waiver"). In 2007, F.S. 393.0661 amended the developmental disabilities waiver to create a four-tiered waiver system (Medicaid Developmental Disabilities 4-Tiered Home and Community Based Waiver). In that amendment, Tier 1 is what was formerly known as the "Big Waiver," and Tier 4 is what was formerly known as the "Little Waiver."

The Agency for Persons with Disabilities (APD) was charged with revising the Florida Administrative Code to align with F.S. §393.0661, as amended. In March 2008, the APD submitted revisions to F.A.C. 65G-4.0021-.0025, and those changes were approved by then acting APD Director Jane Johnson. See F.A.C. 65G-4.0022 to 65G-4.0025 for the specific language defining each of the four tiers.

In May 2008, several waiver recipients filed a challenge to the proposed rules 65G-4.0022 to 65G-4.0025 (the Tier Rules) in the Division of Administrative Hearings (DOAH), *Moreland, et al v. APD*, DOAH case no. 08-2199RP. Petitioners alleged that the rules constituted an invalid exercise of delegated legislative authority. Among several issues, the petition alleged that the rules were arbitrary and capricious because the APD had not developed a valid, reliable assessment instrument and/or conducted assessments on persons who would be affected by services reductions due to arbitrary placements in tiers.

The DOAH administrative law judge (ALJ) held for the APD, stating that the agency had followed appropriate rulemaking procedures in promulgating the Tier Rules consistent with statute. Further, the ALJ held the assessment instruments used in the tier placements were valid and reliable assessment instruments resulting in proper placement of clients within the new tier system. The complainants appealed this decision to the state appellate court.

Following the Final Order issued in favor of the agency, the Tier Rules were implemented by the APD during September 2008, and developmental disability waiver clients were assigned tier placements in the newly redesigned system. In response to their new tier assignments, approximately 5,500 developmental disabilities clients who were receiving public benefits filed a request for a hearing. Most of these clients' hearing requests were filed *pro se* without legal representation. The clients alleged that their public benefits were reduced as a result of their placements in the new tier system. The APD reviewed the requests for hearings and summarily dismissed most of the requests for not meeting the requirements defined by Florida Statutes to warrant a hearing before the Department of Administrative Hearings (DOAH).

Following is a summary of the two key cases, their findings and the current status. *Moreland* appealed the Final Order finding the Tier Rules valid. The *Washington* case alleged that the tier placement under the new law resulted in a reduction of federal public benefits and that the APD's denial of a hearing was a violation of due process under the 14th Amendment of the United States Constitution.

Moreland, (II) v. Florida Agency for Persons with Disabilities (APD)
34 Fla. L. Weekly, D1715 (1st DCA Fla. 2009, Rehearing Denied October 8, 2009)

Moreland, (II) v. APD challenged the new Medicaid Developmental Disabilities 4-Tiered Waiver as defined in F.A.C. 65G-4.0022-.0025. In *Moreland*, Moreland (II), along with Gibson, Cone and Baker, Jr., alleged that the APD, in implementing F.A.C. 65G-4.0021 through F.A.C. 65G-4.0025, failed to follow appropriate rulemaking procedures and participated in the exercise of unauthorized legislative authority contravening the statutory language of F.S. §393.066(3) by not developing appropriate "assessment instruments" and processes to appropriately place clients within the new Medicaid Developmental Disabilities 4-Tiered Waiver system as defined in F.S. §393.0661.

On Aug. 21, 2009, the appellate

court reversed the ALJ's decision, ruling: 1) the APD failed to demonstrate that the rules adopted a valid, reliable assessment instrument required by F.S. §393.0661(3) and thereby resulted in inappropriate placement of clients in the new four-tiered waiver system; and 2) some of the rules adopted by the APD, F.A.C. 65G-4.0021, F.A.C. 65G-4.0024 and FASC 65G-4.0025, were invalid. In addition, although the appellate court did not consider the following rules "invalid," it also struck proposed rules F.A.C. 65G-4.0022 and F.A.C. 65G-4.0023. The appellate court opined that these rules were implemented as an invalid delegation of legislative authority because the rules were revised in a manner that enlarged, modified and/or contravened specific provisions of F.S. 393.0661 as implemented.

The APD did not agree with the court's ruling. On Sept. 8, 2009, the APD filed for a rehearing, an alternative motion for *en banc* rehearings based on exceptional importance and a motion to certify the case to the Florida Supreme Court because the case was of great public importance. On Oct. 8, 2009, all three of the APD's motions were denied by the appellate court. A mandate was issued Oct. 26, 2009.

As a result of the federal appeals court ruling in *Washington*, summarized hereinafter, the APD filed a motion in the state appellate court to remand those cases appealing denials of hearings back to the APD for rehearings. Orders were granted on those motions in state appellate cases.

In addition, the APD also filed a motion for reconsideration and notice concerning reevaluation of tier assignments stating that 1) every final order of the APD that denied a hearing request will be withdrawn; 2) the APD will set forth an emergency rule to redress the tier assignments under F.A.C. 65G-4.0021-.0025, and every recipient in those cases denied hearings will be reevaluated according to the new emergency rules; 3) every recipient will be provided another notice of tier assignment along with a detailed statement providing the reasons behind the assignment; and 4) every recipient will be given the opportunity to file a new or an amended request for hearing based on that new tier assignment.

At the time of the printing of this article, the APD is in the process of defining the emergency rule and has not yet published same.

Washington, Watts, Cole, Thomas v. DeBeaugrine, Director of APD et al
Case No.:4:09-cv-189-RH/WCS (United States District Court for Northeast District of Florida – Tallahassee Division)

This case involves an issue related to denial of due process rights. The appellants in *Washington* chose not to appeal at the state level and opted for federal court with their challenge.

In *Washington*, plaintiffs Washington, Watts, Cole and Thomas sought class action status and alleged that under the new Florida developmental disabilities law, the tier assignments they received resulted in a reduction of the federally funded public benefits they were receiving without due process of law. They alleged that tier assignments were erroneously arrived at and that they were denied a hearing by the APD in violation of the 14th Amendment of the United States Constitution's right to due process: anyone receiving a reduction in federal welfare programs must be afforded access to a hearing.

In the APD's initial review of the plaintiffs' requests for fair hearings, applying the state's standards for a formal hearing before the DOAH, the APD opined that the appellants' requests for hearings did not contain enough specific facts pursuant to requirements of F.S. 120.569 to justify a hearing at the DOAH level. Thus, hearings before the DOAH were denied on that basis.

In *Washington*, the court granted the plaintiffs' motion for preliminary injunction and held that under the 14th Amendment of the United States Constitution, appellants have a protected property right in Medicaid benefits and that the agency must afford them an opportunity for a fair hearing when the appellant "simply" pleads circumstances indicating "erroneous" action by a state agency resulted in a termination, suspension or reduction of Medicaid eligibility coverage. See 42 CFR 431.201. See also F.S. §120.569 and F.S. §120.57.

In the federal district court's order issued Oct. 1, 2009, the ruling pointed out that there is a distinction to be recognized between the requirements to be afforded a hearing at the state level and the *less stringent* requirements at the federal court level. See 42 C.F.R. §431.221(b). At the federal level, the beneficiary need not file a formal pleading setting forth with specificity the actual basis of his or her claim. "Instead, the beneficiary need only have requested a hearing and asserted the agency's actions were actually erroneous." The court goes on to state that a beneficiary who fails to adequately plead a claim under a state law's procedural act does not necessarily fail to adequately invoke his or her right to a hearing on the same issue at the federal level. At the federal level, any reduction in public benefits without due process of law is a violation of the 14th Amendment of the United States Constitution and 42 U.S.C. 1983. See also F.A.C. 65G-2.04342, CFR §431.205(d) and *Goldberg v Kelly*, 397 U.S. 254 (S Ct. 1970) and 42 U.S.C. §1396a(a)(3). The court issued a preliminary injunction prohibiting the agency from terminating or reducing the waiver benefits prior to affording a hearing. The court delineated the hearing requirements that were to be followed by the APD to comply with the order.

Of note is that the court holds that state court judicial and administrative

continued, next page

DD-4 Tiered waiver
from preceding page

remedies need not be exhausted to pursue a claim under federal law for remedies under 42 U.S.C. §1983. See *Monroe v. Pape*, 365 U.S. 167, 180, 81 S.Ct. 473, 5 L. Ed. 2d. 492 (1961). See also *Patsy v. Board of Regents*, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d. 172 (1982), and *Beaulieu v. City of Alabaster*, 454 F.3d. 1219, 1226-1227 (11th Cir. 2006).

Conclusion

As for the impact of the *Moreland* decision, as of the date of this article, it is yet to be seen exactly how the state will address and or redefine the tier placement rules to ensure valid assessment tools are defined as the court required.

Applying the *Washington* holding, for those pursuing an appeal of placement for a developmentally disabled child, under the right circumstances, as outlined in this article, state court remedies need not be exhausted to pursue a claim in federal court if a denial of a hearing for federal benefit programs is made on an "actually erroneous" basis.

As elder law attorneys, we are constantly challenged to expand the knowledge we already possess of a vast array of legal disciplines. As our clients who are caring for children with developmental disabilities age, many of us will be faced with assisting those parents in advocating for their children's continued access to the public benefits system.

Following are several very helpful links to assist a lawyer in the processes and procedures necessary to appeal a case, including a link to the Florida Legal Services Inc.'s training video on how to challenge a tier waiver placement:

HELPFUL LINKS:

HOW TO APPEAL TRAINING VIDEO
www.floridalegal.org/Training/2008/november/medicaid/index.htm

TRYING A CASE BEFORE DOAH TIPS
http://flaadminlaw.org/Documents/APD_Fair_Hearings_Materials.pdf

ADMINISTRATIVE HEARINGS HOW TO MANUAL
www.advocacycenter.org/documents/Administrative_Hearing_Manual.pdf

***Gregory G. Glenn, Esq**., is chair of the Elder Law Section's Special Needs Trust - Developmental Disabilities Subcommittee. He has been a member of the section and practiced elder law since 1995. He has offices in Boca Raton and Hollywood, Fla., and focuses primarily on Medicaid and veterans benefits planning for those over age 65.*

Ask not what your client can do for you ...

by John T. Griffin, Esq.


J. GRIFFIN

As the economic downturn continues, attorney trust accounts across the state quiver in fear at the thought of being pilfered by their caretakers. But The Florida Bar warns that trust account violations are not the only ethical violations that have seen an increase; violations of Florida Bar Rule 4-1.8(c) also are on the rise. Florida Bar Rule 4-1.8(c) states

> [a] lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

While Rule 4-1.8(c) is clear about the conduct that is prohibited, the rule itself does not define the term "substantial gift." However, consider the case of *The Florida Bar v. Anderson*, 638 So.2d 29 (Fla. 1994), in which Anderson, over the course of two years representing his client, drafted nine testamentary documents for his client, six of which named either Anderson or his wife as beneficiaries of the client's estate. Despite the fact that the Supreme Court found that Anderson did not intend that either he or his wife would benefit from the bequests, neither he nor his wife in fact received any benefit from the bequests and no real injury resulted from his actions, Anderson, who had no prior disciplinary history during his 27 years of practice, was suspended for 90 days for violating Rule 4-1.8(c). According to the court, Anderson was attempting to shield the bequests from the creditors of a local community festival, the actual intended beneficiary of the bequests. The court determined that while Anderson did not personally benefit from the action, the "potential injury to the legal system or legal profession was reasonably foreseeable."

Therefore, if you seek to retain your law license, let the *Anderson* case serve as a reminder that the rule prohibiting the preparation of any document that leaves any gift to the attorney or his or her relatives is express and mandatory, and you would be wise not to test the limits of what is a "substantial gift." Therefore, ask not what your client can do for you, but what you can do without a law license.

***John T. Griffin** is a board certified elder law attorney with the law firm of Griffin & Griffin in Sarasota. He practices in the areas of elder law, Medicaid planning, estate planning and guardianship. He is chair of the Elder Law Section's Resident Rights Committee and co-chair of the 2010 ELS Public Benefits Seminar.*

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REV 09.09

Office of the Attorney General
Medicaid Fraud Control Unit
Patient Abuse, Neglect and Exploitation (PANE)

by Chief Assistant Attorney General Betty Cheramie

The Office of the Attorney General's Medicaid Fraud Control Unit (MFCU) is responsible for monitoring Florida's multibillion-dollar Medicaid program pursuant to F.S. §409.920(9). The MFCU is a statewide law enforcement agency with eight local offices that investigate reports of fraud committed by Medicaid service providers. In addition to investigating Medicaid provider fraud, the MFCU investigates abuse, neglect and exploitation of elderly or disabled patients in health care facilities, including hospitals, nursing homes, assisted living facilities, group homes and adult family care homes.

In carrying out these duties, the MFCU is authorized pursuant to F.S. §409.920(10) to enter the premises of health care providers participating in the Medicaid program to examine documents and to investigate allegations of abuse, neglect or exploitation. A facility's failure to grant the MFCU immediate access to investigate may result in the facility being excluded from Medicare, Medicaid and other federally funded health care programs pursuant to Title 42 of the Code of Federal Regulations §1001.1301(a)(iv). The MFCU also has the statutory authority to subpoena witnesses and documents, including medical records.

The MFCU receives case referrals from many different agencies, including the Agency for Health Care Administration (AHCA), the Department of Health (DOH) and the Department of Children and Families (DCF) as well as concerned citizens. Currently the MFCU monitors the DCF's Abuse Hotline for any complaints of abuse, neglect or exploitation in Florida's health care facilities. If you suspect that an elderly or disabled adult is being abused, neglected or exploited, you are required to report it to the DCF's Abuse Hotline (1-800-96ABUSE). Knowing and willful failure to report known or suspected abuse, neglect or exploitation is a misdemeanor pursuant to F.S. §415.111(1).

In criminal cases of patient abuse or neglect, the MFCU is federally authorized to investigate pursuant to Title 42 of the United States Code §1396b(q), regardless of whether the facility or the patient receives Medicaid funds. The MFCU investigates allegations of financial exploitation of the elderly and the disabled when all of the following criteria are met: 1) the victim resides in a board and care facility that receives Medicaid funds; 2) the victim is a Medicaid recipient; 3) the victim is an elderly person or a disabled adult as defined by F.S. §825.101; and 4) the perpetrator has taken unfair advantage of the victim by obtaining or using his or her funds or assets, or by endeavoring to obtain or use those funds or assets, without the informed consent of the patient by means including but not limited to theft, harassment, intimidation, deception, false representation, false pretenses or undue influence.

Proving criminal abuse or neglect of the elderly or the disabled is difficult because the typical victim may lack capacity or the ability to clearly communicate. These capacity, cognitive or mobility issues are precisely what places these victims at a greater risk for abuse, neglect or exploitation. Therefore, in conducting PANE investigations, the MFCU uses staff with specialized skills. For instance, MFCU law enforcement investigators have expertise in interviewing the elderly and the mentally disabled. In addition, medical investigators, who are also registered nurses, assist in reviewing medical records and providing expert medical opinions. Also, the MFCU employs attorneys who provide field counsel during the course of the

investigations and, at times, seek appointment as special prosecutors for these cases. Many of the MFCU's staff members have received the Elder Crimes Practitioner Designation from the Florida Crime Prevention Training Institute.

The MFCU coordinates "Spotchecks" at various health care facilities around the state. A Spotcheck is an unannounced, multi-agency inspection of residential health care facilities. Typical participating agencies may include the DCF, the local State Attorney's Office, AHCA, the Agency for Persons with Disabilities (APD), the Statewide Advocacy Committee (SWAC), fire marshals, local code enforcement, the County Health Department and the Long-Term Ombudsman Council, among others. The purpose of a Spotcheck is to better facilitate surprise inspections of residential health care facilities to determine if there is any evidence of patient abuse or neglect. If evidence of abuse or neglect is found, immediate action is taken. Communication and coordination between agencies charged with protecting Florida's vulnerable citizens are crucial.

When the state of Florida is affected by natural disasters such as hurricanes, floods, tornadoes or manmade disasters that impact communities beyond the capacity of local departments to manage, the MFCU responds by inspecting health care facilities, except hospitals, which are inspected by AHCA. When the governor has declared a state of emergency, the MFCU deploys sworn law enforcement investigators to facilities in the affected area to ensure the housing conditions are safe and the facilities have adequate supplies to continue housing vulnerable citizens.

The MFCU always welcomes the assistance of private individuals in fighting against abuse and neglect of its vulnerable citizens. To report fraud, abuse or neglect, individuals may use the statewide hotline number, 866/966-7226, or contact the Medicaid Fraud Control Unit nearest them:

- Tallahassee 850/414-3300
- Orlando 407/999-5588
- Tampa 813/287-7940
- Fort Lauderdale 954/712-4600
- Miami 305/377-5441
- Jacksonville 904/858-6919
- West Palm Beach 561/837-5000
- Pensacola 850/595-6057

Call for papers — *Florida Bar Journal*

Len Mondschein is the contact person for publications for the Executive Council of the Elder Law Section. Please email Len at *lenlaw1@aol.com* for information on submitting elder law articles to *The Florida Bar Journal* for 2010. A summary of the requirements follows:

- Articles submitted for possible publication should be typed on 8 & 1/2 by 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.

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QIT success without guardianship

The tip:

In some cases, a health care proxy can petition the court to execute a qualified income trust (QIT) for the Medicaid applicant without establishing a guardianship.

The tale:

A few months ago, I received a telephone call from a desperate son whose mother was recently institutionalized at a local nursing facility. His story was an all too common one. His mother was 95 years old and mentally incapacitated. His father had passed years before. The son explained that the nursing home was applying for Institutional Care Program Medicaid (ICP) to assist in paying for his mother's nursing home care.

In fact, it was the social worker at the nursing home that referred the son to me. The social worker was knowledgeable enough to know that his mother's monthly income, approximately $2,500, exceeded the Florida Medicaid income cap of $2,022/month. The social worker told him, "You just need a qualified income trust (QIT)."

However, this was no ordinary QIT situation. His mother had never executed a power of attorney for finances, a health care power of attorney or a surrogate designation. Obviously, this absence of written authority was problematic.

A review of 42 United States Code 1396p(d)(2)(A) led one to believe that a guardianship was necessary. According to the provision, a QIT can only be created by one of the following: 1) the individual; 2) the individual's spouse; 3) a person, including a court or an administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; and 4) a person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

No problem had existed until this income cap dilemma. The son had been paying his mother's bills as joint owner on her bank account. Medically, the son was making health care decisions for her after signing a health care proxy. Would she now require a guardianship simply because her income exceeded the cap?

Frustrated, yet determined, I recalled that it might be possible to petition a court to have the QIT executed short of the expense and humiliation of a guardianship. I posted a "how to" inquiry on the AFELA listserv. By the end of the day, I had received several responses with sample petitions and orders from some of our very talented elder law colleagues and leaders.

With some invaluable assistance, particularly from Twyla Sketchley, I drafted a petition to the court. The petitioner, the son, stated that he was his mother's health care proxy as defined under §765.401, F.S. (2009), and as proxy, he was to make "health care decisions" for his mother. One of these decisions, as defined within §765.101(5)(b), was to apply for public benefits to defray the cost of health care.

Tips & Tales

Jason A. Penrod

The petition discussed that his attempt to qualify his mother for ICP Medicaid could not be successful unless a QIT was established to account for her excess income. In addition, it discussed the public policy of the state to exercise a less restrictive means to accomplish what a guardianship can accomplish.

In conclusion, the petition stated that pursuant to §765.205 and Florida Probate Rule 5.900, the court had the authority to hear this matter and to order the petitioner to create the QIT. I crossed my fingers and submitted a court order granting the health care proxy the ability to execute the QIT, a draft of the QIT with language to that effect and the petition to the Polk County Circuit Court.

Then the dreaded roadblock came—the call from the guardianship clerk telling me that a guardianship was necessary. I took a couple of deep breaths and asked her if I could take some time to explain the situation to her. By the end of this conversation, she felt for my client, realized the unique situation and agreed to accept a legal memorandum for the judge.

Thanks to Emma Hemness, I had a great sample memorandum to adapt to my client's situation. The memorandum discussed 1) the Florida Medicaid income cap; 2) how a QIT could avail one to benefits; 3) why court involvement was sought; and 4) why court action in lieu of a guardianship was appropriate.

Then good news came. We received the order empowering the health care proxy to execute the QIT. The son funded the QIT in his role as joint owner on the account. The application for Medicaid was filed, and we are awaiting an approval. All this, and no one had to adjudge this widow incapacitated, saddle the son with the expense of guardianship or add further burden to our overworked judicial system.

Please note that this good news may not be available to all elder law attorneys and their clients. Unfortunately, some courts in Florida are reluctant to exercise their authority under the federal statute. As a result, some Florida courts will not act on a standalone petition, and a guardianship must be opened instead. Please be aware of this issue and ask local colleagues about their experiences in your area prior to filing your petition so that you can avoid undue delay resulting in Medicaid ineligibility.

Jason A. Penrod *graduated from Vanderbilt Law School and moved to Florida in 2003. He became a partner with the Lake Wales law firm Weaver, McClendon & Penrod LLP in 2008, with a focus on elder law and Medicaid and VA benefit planning. He has served as the Lake Wales Rotary Club president in 2009 and is the incoming Lake Wales Chamber of Commerce president.*

Summary of selected caselaw

by Nicholas J. Weilhammer

Klingensmith v. Ferd and Gladys Alpert Jewish Family, 997 So.2d 436 (Fla. 4th D.C.A. 2008).

Appellee (AJFCS) was former guardian of the person and was current guardian of decedent's property until decedent's death, and AJFCS filed a petition for administration of decedent's estate. Before dying intestate, decedent had sued AJFCS, *inter alia*, for breach of fiduciary duty. Shortly after decedent's death, AJFCS filed a caveat as former guardian, and later filed a petition for administration.

Appellant, the mother of decedent, also filed a petition for administration, specifying her interest as the sole heir of her daughter. In response, AJFCS filed several papers and sought discovery. The trial court found that AJFCS had standing to file the papers and to engage in motion practice and discovery. Mother appealed these orders.

The court held the trial court's finding that AJFCS had standing to "file" the petition was not in essence a finding that AJFCS was an interested person under the probate code. The trial court did not finally determine whether AJFCS was an interested person and therefore able to petition for administration. Rather, the trial court found only that AJFCS had standing to "file" a petition for administration, and the order on appeal did not therefore put an end to all judicial labor on the issue of whether AJFCS was an interested person under the Probate Code. Therefore, the court was without jurisdiction. Dismissed.

Hunt v. Hooper, 996 So.2d 940 (Fla. 2d D.C.A. 2008).

Children of co-trustee of a trust alleged undue influence and breach of fiduciary duty against trustee.

The trial court dismissed the action with prejudice pursuant to §737.203, Fla. Stat. (2006), which applies the concept of *forum non conveniens* to actions involving trusts. The trial court found that the more appropriate forum for litigation in this case was Canada because trustee was domiciled in Canada, the father and trustee were married in Canada and maintained their primary residence there, trustee did not conduct any business in Florida, all trust administration occurred in Canada, the trust property was located in Canada and none of the beneficiaries were located in Florida.

The court determined that §737.203 was inapplicable because the alternative forum was a foreign country, as opposed to a "state." There is no indication in the statute that it intends its reach to be broader than its plain language suggests, and the court found no cases applying §737.203 to trusts whose principal place of administration is a foreign country. The court also had serious concerns regarding the ability of the courts in many foreign countries to apply Florida law in construing a dispute like the one in this case. Reversed and remanded.

Five Points Health Care, Ltd. v. Mallory, 998 So.2d 1180 (Fla. 1st D.C.A. 2008).

Attorney-in-fact (AIF) signed the nursing home admission agreement, which contained an arbitration clause. The trial court held that the POA did not grant any power to enter into an arbitration agreement.

The court held the broad POA unequivocally expressed the principal's intent to make a comprehensive grant of authority to the AIF. Therefore, the grant of authority in the POA authorized the AIF to consent to arbitration. Reversed.

Levine v. Levine, 4 So.3d 730 (Fla. 5th D.C.A. 2009).

Son filed an incapacity petition against his father. The examining committee members determined the father was not incapacitated, and the court dismissed the petition under Florida Guardianship Law and ordered the son to pay the committee's fees.

The son did not have a right to an evidentiary hearing to challenge the opinions of the examining committee. Once the examining committee concluded that the alleged incapacitated person had full capacity, the trial court was required to dismiss the petition to determine incapacity. However, the court can award fees only if it finds the petition was filed in bad faith, F.S. §744.331(7)(c). Affirmed in part and reversed in part.

Bigelow v. State of Florida, 997 So.2d 1249 (Fla. 5th D.C.A. 2009).

Defendant challenged amount of restitution after pleading no contest to exploitation of the elderly. At the restitution hearing, the only evidence was testimony from an employee of defendant's former employer, an agency that assisted the elderly with certain tasks. The witness had no personal knowledge of the victim's losses and testified about those losses based upon her review of the victim's unauthenticated bank records, which were also admitted into evidence.

The State must prove the amount of the victim's loss. Hearsay evidence may not be used to determine the amount of restitution when there is a proper objection. Remanded.

Morris v. Knight, 1 So.3d 1236 (Fla. 4th D.C.A. 2009).

Three persons filed competing petitions to be appointed guardian: ward's first cousin; the daughter of the first cousin; and a neighbor and friend of ward. The court appointed the neighbor based on his fitness to serve as guardian and ward's demonstrated wish to entrust her care to him. The relatives alleged they should be given statutory, preferential consideration and that the neighbor had a conflict of interest.

The appointment of guardian is a discretionary act of the trial court, which must be supported by logic and justification and founded on substantial competent evidence. Relatives

continued, next page

receive preference in appointment; however, the court has the discretion to give preference to a non-relative who possesses particular experience or ability to serve as guardian. The best interest of the ward trumps other considerations in the appointment of a guardian. The relatives did not demonstrate how moving ward to a "better" nursing home would best serve her interests. The relatives had minimal involvement in ward's care.

The relatives contended that because the neighbor-guardian is the sole beneficiary of ward's will, he stands to gain more by spending less on her care. There was no record evidence of such conflict. It did not appear from the record that ward had any significant assets other than her house. The findings of fact reflected that the neighbor selflessly used his own money for ward's care while her relatives remained minimally involved in her life. The allegation was also not preserved for appellate review. Affirmed.

Macintyre v. Wedell, 12 So.3d 373 (Fla. 4th D.C.A. 2009).

Settlor executed a revocable trust agreement transferring her assets to a revocable trust. Under the terms of her will, the residue of her estate would pour over into the trust. At the time of her death, the residue of her trust was to be equally divided among three of her sisters. Following her death, her sister MacIntyre as trustee filed suit against sister Wedell, alleging that just weeks prior to her death, settlor had placed her money into an account that was jointly titled in hers and Wedell's names and that settlor had transferred cash and securities to Wedell. The trustee alleged the transfers were made when settlor was suffering from physical and mental ailments and were the product of Wedell's undue influence over her. The trial court dismissed the suit with prejudice.

Under *Genova*, a co-trustee could not seek to preclude settlor from revoking her trust on the grounds of undue influence, but suggested that settlor could be precluded from revoking the trust if she were incompetent. In light of *Genova*, even after settlor's death, settlor's revocation of her revocable trust during her lifetime was not subject to challenge on the ground that the revocation was the product of undue influence. Affirmed.

Sovereign Healthcare of Tampa, LLC v. Estate of Huerta, 14 So.3d 1033 (Fla. 2d D.C.A. 2009).

Decedent executed a durable power of attorney. Agent completed the paperwork for admission to a nursing home pursuant to the DPOA. Trial court denied motion to compel arbitration in action for negligence against the nursing home based upon the *McKibbin* case, whereby the court denied arbitration where the POA did not give the agent the legal authority to enter into an arbitration agreement on behalf of the principal.

McKibbin was limited to the facts. Here, the catch-all provision of the DPOA indicated that it set forth a broad and unambiguous grant of authority to the agent, including grants of authority to consent to hospitalization and "to sign any and all releases or consent required" to effectuate such hospitalization. Reversed and remanded.

Ehrlich v. Allen, 10 So. 3d 1210 (Fla. 4th D.C.A. 2009).

Involuntary petition to determine competency was filed, and the subject was not found incompetent.

The court reversed the award of fees to the attorney for alleged ward. Any award of fees incurred by counsel appointed to represent the subject must come, if at all, from petitioner. See §744.331(7)(c), Fla. Stat. (2007).

Fair Hearings Reported

by Nicholas J. Weilhammer

Petitioner v. Florida Department of Children & Families, Appeal No. 08F-01967 (District 07 Orange; Unit 66292, June 9, 2008).

Petitioner applied for MEDS-AD in April 2007. DCF denied the application because assets exceeded the $5,000 limit between February and June 2007. Husband and son signed a handwritten document in October 1998 for $15,000 to pay off petitioner's mortgage to be repaid "whenever." No other details or repayment plan appeared, and repayment had not occurred. With assets depleted, ICP was authorized July 2007.

In the absence of any repayment plan or ongoing repayment, the $15,000 described in the October 1998 document did not constitute a bona fide loan for asset reduction purposes. Thus, assets exceeded ICP limits between February and June 2007. Appeal denied.

Petitioner v. Florida Department of Children & Families, Appeal No. 08N-00051 (district and unit information redacted, June 9, 2008).

Petitioner was to be discharged from the facility on the basis her needs could not be met. Petitioner desired to stay at the facility.

Petitioner had 23 doctors outside the facility, and there was not proper communication with the doctors in and outside the facility, medications were not properly coordinated, she smoked and drank against doctor's orders, she was noncompliant with orders regarding her wound care and she spent the entire day in a wheelchair. Petitioner's needs could not be met at the facility. Appeal denied.

Petitioner v. Florida Department of Children & Families, Appeal No. 08N-00035 (district and unit information redacted, June 13, 2008).

Petitioner was Baker Acted in February 2008 after several episodes of violent or disruptive behavior and was discharged with no advance notice on an emergency basis that he

endangered the safety of others at the facility. Petitioner wanted to return to the facility.

Petitioner's alleged behavior included yelling at staff, hitting a female nurse in the chest after calling her names, cursing, and lunging at another nurse. Petitioner also displayed aggressive behavior with his roommate.

Petitioner and his witnesses disagreed with the events and characterizations. The ombudsman believed the facility made late entries in petitioner's records to have records to support the reasons for the Baker Act. The facility countered that late entries are allowed; altered entries are not.

Petitioner's behavior endangered the safety of other residents in the facility. Appeal denied.

Petitioner v. Florida Department of Children & Families, Appeal No. 08F-02416 (District 01 Escambia; Unit 88637, June 18, 2008).

Petitioner applied for ICP in January 2008. Petitioner's assets included a life insurance policy and a checking account, which exceeded asset limits. DCF advised petitioner to reduce the assets by buying an irrevocable preneed burial contract rather than paying the nursing home. As a matter of procedure, DCF explains its policy to a petitioner or a representative but does not mandate that spend down of resources must be used for any particular purpose.

Petitioner's life insurance policy had a cash surrender value, after application of the burial exclusion policy, of over $3,000 in excess of asset limits. Appeal denied.

Petitioner v. Florida Department of Children & Families, Appeal No. 08F-03997 (District 07 Osceola, Unit: 66292, Aug. 1, 2008).

Petitioner applied for ICP and established an income trust in October 2007. DCF did not advise petitioner of the amount needed to fund the trust and processed the application without an interview. In January 2008, petitioner received notice that ICP benefits were denied from July 2007 through December 2007 based on excess income. Petitioner funded the trust in January 2008.

Petitioner's income exceeded the amount for ICP eligibility. *Forman v. DCF* is similar to this appeal, and it addressed DCF's requirement to advise ICP applicants at least orally of the conditions relevant to her eligibility. DCF had an affirmative duty to advise petitioner by at least November 2007 of the federal benefit rate for eligibility. The ACCESS Customer Service Center and the policy manual require an interview. It can be assumed petitioner would have fully funded the trust when informed of the requirement. Appeal remanded and partially granted.

Petitioner v. Florida Department of Children & Families, Appeal No. 08N-00130 (district and unit information redacted, Aug. 1, 2008).

Nursing home sought to transfer petitioner for nonpayment and improved health so that he no longer need the facility's services. Petitioner was admitted to the facility on Mar. 4, 2008. Medicaid benefits were applied for in April 2008. ICP was authorized effective Mar. 4, 2008, through July 2008. The issuance date for the transfer was July 1, 2008, when the balance was $0.

The facility did not include a transfer notice signed by the physician, so the hearing officer dismissed the transfer for improved health. The transfer for nonpayment was premature. Appeal granted.

Petitioner v. Florida Department of Children & Families, Appeal No. 08N-00090 (district and unit information redacted, Aug. 4, 2008).

Nursing home sought to discharge petitioner because the safety of other individuals in the facility was endangered. Petitioner had dementia and was accused of displaying problem behaviors including spitting in the hallway, wandering, agitation and fighting with her roommate and staff. The respondent alleged the outbursts had been ongoing since February 2008 and continued into June 2008. Petitioner's daughter thought everything was under control since her medications had been changed, and petitioner was more relaxed.

The hearing officer cannot rely solely on hearsay when rendering a decision. The petitioner's behaviors were not acceptable and needed correction. However, there was not the requisite level of clear and convincing evidence that petitioner's continued stay at the respondent facility endangered other individuals' safety. Further, F.S. §400.0255 (7)(b) required the resident's physician or medical director to document why petitioner's stay at the facility would endanger the safety of other individuals at the facility. Appeal granted.

Petitioner v. Florida Department of Children & Families, Appeal No. 08F-03663 (District 10 Broward, Unit 88139, Aug. 7, 2008).

Petitioner applied for ICP in March 2008. DCF denied petitioner's application for benefits from September 2007 through February 2008 due to excess assets, but benefits were approved for March 2008. Petitioner argued that funds were restricted pursuant to court orders and were therefore unavailable.

DCF's counsel agreed in June 2008 the funds were for use for compensation of the guardian and were restricted as of the date of the order, which covered a retroactive period. Counsel instructed DCF to respect the court order. Hearing officer agreed they were restricted and petitioner should be approved for September 2007 through February 2008. Appeal granted.

Petitioner v. Florida Department of Children & Families, Appeal No. 08N-00106 (district and unit information redacted, Aug. 19, 2008).

Nursing home sought to transfer petitioner on the grounds that her needs could not be met at the facility. Specifically, petitioner's complaints about the food were affecting other residents. Petitioner was also accused of hoarding food, refusing to take antidepressants and not being compliant with her plan of care.

Petitioner's complaints were unfortunate but did not rise to a level where her needs were not being met. The respondent showed no evidence that as a result of petitioner's dislike of the food she was malnourished, losing weight or being affected medically. Appeal granted.

Petitioner v. Florida Department of Children & Families, Appeal No. 08N-00106 (District 04 Duval, Unit: ICP, Aug. 8, 2008).

Law firm submitted petitioner's ICP application. DCF questioned

continued, next page

Fair Hearings Reported
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transfers from banking accounts. While the spend-down schedule accounted for $50,000, no explanation was provided for the disposition of $53,000.

Petitioner's daughter-in-law asserted law firm handled the ICP application. Wanting to avoid being charged by the attorney for each call, she contacted DCF directly. Due to client's direct contact with DCF, the law firm terminated representation and sent a copy of termination to DCF. DCF learned of additional bank accounts. Petitioner's daughter-in-law admitted the excess assets, but asserted she transferred the funds according to the directions of the attorney, who had information regarding the second spend-down schedule, but would no longer communicate with her. The attorney denied the existence of a second spend-down schedule for $53,000 and sent a copy to DCF.

Documentation did not explain the transfer, which rendered petitioner ineligible for ICP. Appeal denied.

** * * Fair Hearings Reported order form on back page. * * **

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Schedule of Events

Thursday, January 14, 2010

7:50 a.m. – 8:20 a.m.
Late Registration – Continental Breakfast

8:20 a.m. – 8:30 a.m.
Welcome and Announcements
Len Mondschein, Miami

8:30 a.m. – 9:20 a.m.
Health Care Directives and Proxies
Scott Solkoff, Delray Beach

9:20 a.m. – 10:10 a.m.
Pre-Mortem Legal Planning
Nikki Boone Melby, Brevard, NC

10:10 a.m. – 10:30 a.m.
Break

10:30 a.m. – 11:20 a.m.
Probate, Elective Share and Homestead
Mike Pyle, Daytona Beach

11:20 a.m. – 12:00 p.m.
Trust Administration
Patrick Lannon, Coral Gables

12:00 p.m. – 1:10 p.m.
Lunch (included in registration fee)

1:10 p.m. – 2:00 p.m.
Social Security
David Lillesand, Miami

2:00 p.m. – 2:30 p.m.
Special Needs Trust
David Lillesand, Miami

2:30 p.m. – 2:50 p.m.
Break

2:50 p.m. – 3:40 p.m.
Long Term Care Insurance, Annuities, and Reverse Mortgages
Joe Karp, Palm Beach Gardens

3:40 p.m. – 4:10 p.m.
Age/Disability Discrimination
Gary Anton, Tallahassee

4:10 p.m. – 4:40 p.m.
Administrative Advocacy
Ellen Morris, Boca Raton

4:45 p.m. – 5:45 p.m.
Reception – All Attendees Invited

Friday, January 15, 2010

7:50 a.m. – 8:20 a.m.
Continental Breakfast

8:30 a.m. – 9:20 a.m.
Guardianship
Enrique Zamora, Miami

9:20 a.m. – 9:50 a.m.
Medicare
Representative – Center for Medicare Advocacy, National Office, Connecticut

9:50 a.m. – 10:00 a.m.
Break

10:00 a.m. – 10:50 a.m.
Medicaid Planning after DRA
Howie Krooks, Boca Raton

10:50 a.m. – 11:20 a.m.
Housing Options
Victoria Heuler, Tallahassee

11:20 a.m. – 12:10 p.m.
Ethics
Rebecca Morgan, St. Petersburg, Roberta K. Flowers, St. Petersburg

12:10 p.m.– 1:10 p.m.
Lunch (included in registration fee)

1:10 p.m. – 1:40 p.m.
Nursing Home Torts/Resident Rights
Ed Boyer, Sarasota

1:40 p.m. – 2:10 p.m.
VA Benefits
Alice Reiter Feld, Tamarac

2:10 p.m. – 3:00 p.m.
Litigating for the Elder Law Attorney
Twyla Sketchley, Tallahassee

3:00 p.m. – 3:20 p.m.
Break

3:20 p.m. – 3:50 p.m.
Tax
Steve Kotler, Naples

3:50 p.m. – 4:20 p.m.
Abuse, Neglect, and Exploitation
Erika Dine, Bradenton

4:20 p.m. – 4:50 p.m.
Tips for Certification Exam
Len Mondschein, Miami, Marjorie Wolasky, Miami, Jana McConnaughhay, Tallahassee,and Enrique Zamora, Miami

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A block of rooms has been reserved at the JW Marriott Grande Lakes/Orlando, at the rate of $159 single/double occupancy. To make reservations, call the JW Marriott Grande Lakes/Orlando directly at 1-800-228-9290. Reservations must be made by 12/23/09 to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

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The reports are emailed on a monthly basis and posted on the section's website at *eldersection.org.* It takes approximately 30 to 60 days after the month's end to receive the opinions, so mailings will typically be several months behind.

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