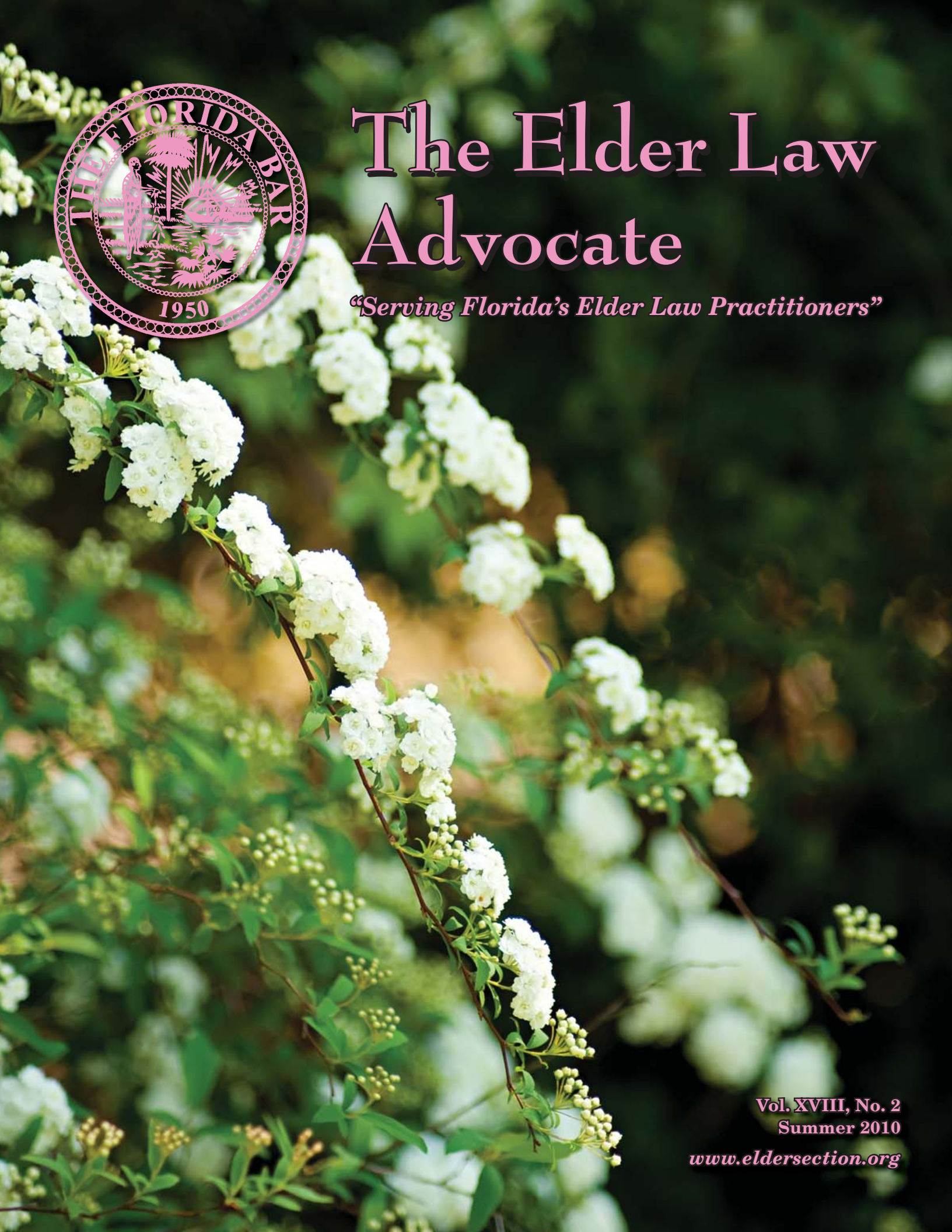

The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

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Summer 2010
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The Elder Law Advocate

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COVER ART

"In the Garden" by Robin Adams

Robin Adams Photography

www.robinadamsphotography / blogsplot.com

Contents:

The deadline for the FALL ISSUE is NOVEMBER 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.

An adventure outside my comfort zone ...

At the conclusion of my year as chair of the Elder Law Section, I have one prominent thought. I have more friends in this field than I've ever dreamed of. For me, this was a journey outside of my comfort zone. What I found on the other side were wonderful, lasting friendships. Doesn't it often take an adventure to bring people together?

So to my friends, and you know who you are, I say thank you. To those of you who don't know me or the section very well, I say go out of your comfort zone—surprising things will happen.

The coolest thing about being chair is that you are at the center of a vast amount of information. You know everything that is going on in the field. You often know it before anyone else. It is a tremendous feeling and quite addictive. I doubt I'll be able to wean myself off of this addiction. I'm sure it is the combination of this addiction and friendship that draws our leaders from the past back to the task force, the section's activities and AFELA year after year.

Of course, the biggest news of the year is the vote to change our name to the Elder and Disability Law Section. David Lillisand, czar of the name-change movement, has secured the approval of various other sections. This is important because the name change is most likely to be approved by the Board of Governors if it is supported by other sections. I predict this will pass and be adopted in 2012 by the Florida Supreme Court and that our section will double in size in five years.

The task force performed amazing feats this year and continues to work with DCF to insist upon rule making, correct interpretation of DRA and proper implementation of the law. Randy Bryan's chairmanship of the task force has been flawless. To my knowledge, there is nothing like the task force in any other section of the Bar. Currently, Charlie Robinson is helping the section and the task force work with RPPTL's Power of Attorney Committee to make some adjustments in a proposed rewrite of Chapter 709. We are making suggestions that are essential to our clients.

Babette B. Bach

Message from the immediate past chair

We are just about to launch the indexing of Fair Hearing reports on our website. This will make research much easier. We are beginning with the current Fair Hearings and are working our way backward in time. We thank the Center for Special Needs Trust for sponsoring this important project.

A historic new committee, the Health Law Committee, was recently launched to study the Patient Protection and Affordable Care Act. This committee is a joint committee with the Health Law Section. Each section will appoint members. Our committee members are Joan Nelson Hook, Charlie Robinson, David Lillisand, Emma Hemness, Randy Bryan, Beth Prather, Carolyn Landon and myself. This committee is planning a CLE for February 2011. It is the first time the Health Law and Elder Law sections have presented a joint CLE.

Other major achievements this year include hiring Twyla Sketchley to be our "real time" legislative liaison in Tallahassee, our groundbreaking free mentoring program and our full-day Veterans Benefits CLE.

It is not possible to thank everyone or to highlight all of the outstanding performances this year. Just know they were abundant and exciting.

I'd like to conclude by talking about the future. I predict we will become more political because we represent the population that uses the largest percentage of our state and federal resources for care and support. I also predict the state and federal governments' funding of programs will evolve into a managed care model with private providers implementing Medicaid programs. We currently see this with many of the waiver programs. The state is likely to lack the staff and resources to successfully monitor the private care providers. The burden of being the watchdog of the poorest and neediest will fall squarely on our section's shoulders. We can and should be a source of information to the state and federal governments on the implementation of these programs. We need our task force to spearhead this, and the task force needs your financial and political support. We are making important things happen.

Thank you for this amazing year.

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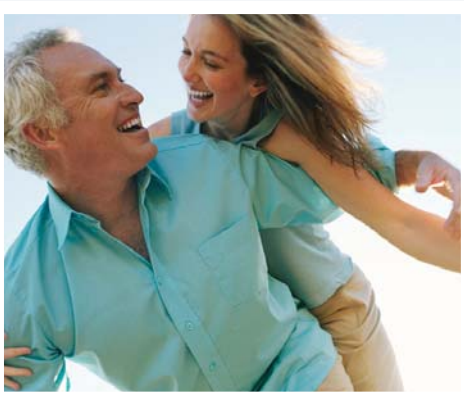
There's a reasonable doubt you do.



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Preparing for the 2011 legislative session

by Twyla Sketchley and Tom Batchelor

T. SKETCHLEY

T. BATCHELOR

Two years ago, after the 2008 legislative session, we reported in *The Advocate* on the efforts of the Elder Law Section to craft a legislative agenda, to monitor the activities of the Legislature regarding issues of concern to us and our clients and to influence policies affecting our clients and our practices. The 2010 legislative session is now over, and again Florida's citizens will enjoy or endure its impact. During this session, the Elder Law Section and its members advocated formally and informally for the benefit of Florida's special needs citizens.

2010 legislative report

Because 2010 is the biennium review of all legislative positions by The Florida Bar Board of Governors, the section voted on June 25 to continue the following legislative positions:

- Opposes legislation that would limit awards, attorney's fees and costs in liability actions brought against nursing homes or assisted living facilities.
- Supports legislation that would increase staffing ratios, governmental oversight and Medicaid reimbursement rates to improve the general quality of care for residents in any long-term care facility, and opposes legislation that would decrease staffing ratios, governmental oversight and Medicaid reimbursement rates or otherwise decrease the general quality of care for residents in any long-term care facility.
- Opposes legislation that would restrict or revoke driving privileges based solely upon aging factors.
- Supports legislation that would enhance enforcement of existing provisions to revoke driving privileges from persons who are determined to be impaired.
- Opposes legislation that would eliminate or diminish the rights of residents of any long-term care facility.
- Opposes any legislation that would allow the clerks of court in any and/or all circuits to assess and collect audit fees or other fees in guardianship or probate cases that would be a percentage of the total amount or value of the respective guardianship or probate estate.
- Opposes any legislation that would decrease current courts' authority and control over guardianship or probate matters while increasing, correspondingly or otherwise, the clerk of courts' authority over these same matters.
- Supports the development and implementation of a public education program stressing the need for screenings for memory impairment and the importance of early diagnosis and treatment of Alzheimer's disease and related disorders, and supports the mandate that the Department of Elder Affairs conduct, or provide support for, a study on the benefits of memory screenings and the scientific evidence on the techniques for memory screening.
- Supports adequate funding of the state courts system, state attorneys' offices, public defenders' offices and court-appointed counsel.
- Supports legislation that provides for designation of a health care representative.
- Supports legislation that protects an individual's rights relating to his or her health care decisions regardless of incapacity, and opposes any legislation that erodes such rights.
- Supports legislation that enhances and increases the protection of vulnerable adults wherever they reside, and opposes any legislation that erodes or decreases such protection.
- Supports legislation to provide residents of assisted living facilities a process for administrative hearings and administrative review of discharge decisions.
- Supports legislation that increases the personal needs allowance to qualified individuals residing in any long-term care, health care and/or residential facility.
- Supports legislation requiring a specific pleading against a vulnerable adult defendant.
- Opposes legislation requiring filial responsibility for long-term care of adults.
- Supports legislation recognizing the economic value of care provided to vulnerable adults by family members and friends.

These positions led the section to successfully support and oppose various bills throughout the session. Among the bills actively supported by

continued, next page

the section was HB 91, which requires that the central abuse hotline must transfer to the appropriate county sheriff's office reports of known or suspected abuse of a vulnerable adult involving a person other than a relative, caregiver or household member. The bill allows the Department of Children and Family Services (DCF) to file a petition to determine incapacity in adult protective proceedings. Upon filing the petition, DCF is prohibited from being appointed guardian or providing legal counsel to the guardian.

For several years the section has supported legislation that would protect vulnerable seniors from unscrupulous practices by annuity salespersons. For years these protections have been bottled up in insurance committees. Finally, with some maneuvering by key supporters, some protective provisions were amended into CS/CS/CS HB 2176. The bill makes several changes in the insurance code to enhance penalties for unethical annuities sales practices as well as to provide certain consumer protections for seniors who purchase annuities contracts. For details, see "'Safeguard Our Seniors' legislation passes" in this issue.

The section actively monitored other bills of interest that passed during the 2010 session. They are listed below along with the link to legislative information.

CS/CS/SB 998 - Trust Administration
www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&ElementID=JumpToBox&SubMenu=1&Year=2010&billnum=998

CS/CS/HB 1237 - Probate Procedures (see Probate Special Committee report in this newsletter for details)
www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&ElementID=JumpToBox&SubMenu=1&Year=2010&billnum=1237

CS/CS/SB 1484 - Medicaid
www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&ElementID=JumpToBox&SubMenu=1&Year=2010&billnum=1484

HB 5301 - Medicaid Services
www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&ElementID=JumpToBox&SubMenu=1&Year=2010&billnum=5301

HB 5303 - Agency for Persons With Disabilities
www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&ElementID=JumpToBox&SubMenu=1&Year=2010&billnum=5303

CS/HB 7069 2nd eng. - Screening
www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&ElementID=JumpToBox&SubMenu=1&Year=2010&billnum=7069

The section also supported once again a bill cosponsored by the section's own Rep. Elaine Schwartz (House District 99) directing the Department of Elder Affairs to develop a public education program and to conduct or support a study relating to screening for Alzheimer's disease. The Senate version of the bill, SB 580, passed the Senate but died in House messages.

Legislative Team 2010

Under the leadership of Babette Bach, ELS chair, and Ellen Morris, chair of the Legislative Committee, our legislative team included the authors of this article, Twyla Sketchley, elder law attorney and legislative liaison, and Tom Batchelor, Ph.D., our section's legislative consultant. A former staff director of the Florida House Elder and Long-Term Care Committee (1993-2003), Tom has been helping to develop and refine our legislative program since June 2003. The team also included Ken Plante, lobbyist for the Academy of Florida Elder Law Attorneys (AFELA) and a former elected member of the Florida Senate.

Twyla Sketchley

While Twyla has been involved in legislative activities for several years, her involvement was more formalized prior to this year's session. Her main duties consist of reviewing all legislative bills of interest, reviewing legislative committee analysis of bills, assigning bills to substantive committees for review and analysis, assisting in the development of legislative positions, participating in Elder Law Task Force calls and legislative committee calls, coordinating efforts with Tom Batchelor and Ken Plante regarding legislative advocacy, providing quick response to legislative issues arising throughout the session, assisting substantive committees as needed with legislative analysis and talking points and providing technical assistance to legislators and legislative committees regarding bills and other legislative issues when requested.

Tom Batchelor

As an original member of the Elder Law Task Force, made up of members of the Elder Law Section and AFELA, Tom works closely with the team to make sure any legislation of potential interest to our membership is identified and monitored. In addition to answering questions posed by the section's members, Tom assists the section with a variety of legislative support tasks. He monitors and reports on bills that impact the section's members and their clients and the section's legislative agenda; participates in the section's legislative conference calls; gives guidance to the section's leadership and its members regarding the legislative process, the various legislative committees and their roles; provides information and support to the section's members as they prepare articles, speeches and conferences; attends section conferences and meetings at the request of the section's chair; and provides

a legislative wrap-up at the close of each legislative session.

Ken Plante

Under contract with AFELA for the past three years, Ken has worked closely with House and Senate leaders to advance the legislative priorities of AFELA. He is a regular participant with the task force on the weekly conference calls and works with Tom and Twyla to stay on top of issues of importance to elder law clients and attorneys. His experience as a state senator, knowledge of the legislative process and his stellar reputation as a lobbyist for many years have been extremely valuable in efforts to protect the interest of Florida's seniors.

Legislative Agenda 2011

In preparation for the 2011 legislative session, the Executive Council of the section voted to adopt 10 new legislative positions that will address issues expected to arise during the 2011 session. On June 25, 2010, the following new positions were adopted:

- The section supports adequate funding for programs allowing Florida's seniors to age in place.
- The section opposes reduction or elimination of funding for programs allowing Florida's seniors to age in place.
- The section supports public access to long-term care insurance at reasonable and affordable costs with adequate and reasonable benefits.
- The section opposes the expansion of creditors' rights beyond the current statutory and common law rights available to creditors under Florida law.
- The section opposes legislation that limits acceptance and effectiveness of durable powers of attorney by financial institutions or entities to whom a durable power of attorney is presented and that requires additional reporting requirements to those already required by current statutory and common law in Florida.
- The section supports legislation that would increase and enhance the rights of residents of any long-term care facility.
- The section supports legislation that exempts the addresses and telephone numbers of LTCO volunteers from public records laws.
- The section supports legislation to restrict the use of overly burdensome and onerous provisions in admissions contracts for assisted living facilities and skilled nursing facilities. The section supports legislation that aligns state law with Veterans' Administration federal law with regard to the treatment of low income pension with Aid and Attendance.
- The section opposes legislation that impoverishes the spouses of veterans living in the community.

What you need to know to be an advocate

Although The Florida Bar can take only limited legislative positions (See: *The Florida Bar re Schwar*, 552 So.2d 1094 (Fla. 1989), *cert. denied* 498 U.S. 951, (1990)— reconfirmed in *The Florida Bar re Frankel*, 581 So.2d 1294 (Fla. 1991)), The Florida Bar's various voluntary sections can adopt legislative positions and support or oppose legislation in compliance with the Rules Regulating the Florida Bar. Bar sections get support in furthering their various legislative agendas from The Florida Bar's Governmental Relations staff. The staff "reviews all proposed legislation and attempts to identify every Bar committee or section that may be interested in any bill. Summaries of those bills are arranged by committee or section name, also noting (by way of a three-character acronym) any other committees or sections that may be interested in the bill."

The section has several committees, each addressing different issues within elder law. They were extremely valuable to our legislative team this year and, it is hoped, will continue the ongoing commitment to analyze bills and advise the team on their potential impact. Committee expertise and participation is vital to our success. The substantive committees included Exploitation & Abuse (Carolyn Sawyer and Gerald "Jay" Hemness, co-chairs); Probate (Kara Evans and Sam Boone, co-chairs); Estate Planning (Marjorie Wolasky and David Moule, co-chairs); Guardianship (Carolyn Landon and Beth Prather, co-chairs); Unlicensed Practice of Law (John Frazier, chair); Medicaid & Government Benefits (John Clardy and Emma Hemness, co-chairs); Financial Products (Jill Burzynski); Tax (Martin Cohen, chair); Resident/Facility Rights (John Griffin, chair); Health Care (joint committee with the Health Law Section); Ethics (Rebecca Morgan and Roberta Flowers, co-chairs); Legislative (Ellen Morris and Mindy Stein, co-chairs); Death Care Industry (Philip Weinstein, chair); and Special Needs Trust (Travis Finchum, chair).

These committees follow policy developments, current issues and legislation. They advocate for changes in public policy, advise members and the public of the impact of changes in the law, develop programming for practitioners and work to build bridges between the section's membership and the service community. These committees also work with other Bar sections in joint advocacy. For information on their meetings and projects, visit the committee page of the Elder Law Section's website at *www.eldersection.org*.

In addition to committee work, the section's members provide technical support and needed research to develop the legislative agenda, and they attend legislative hearings. Members also attend local legislative days and public hearings. They meet

continued, next page

with their state senators and representatives. When called on, members also provide technical assistance to legislative staff when questions arise regarding the impact of legislation on Florida's elders. The results can be very beneficial when the section's members meet and become friends with their local legislators and legislative staff and offer to be available to them as experts on elder issues.

As the section sets its 2011 legislative agenda and begins the advocacy process, members' participation is vital. Members are encouraged to participate in committee work, stay in touch with the section's legislative consultant, get involved in the section's legislative advocacy and introduce themselves to their local legislators. It is important that the section have its legislative agenda drafted by November and finalized by January so it can be submitted for the Bar's approval and distributed to the section's members, legislative committees, other Bar sections and statewide advocacy organizations.

The Florida Bar's Office of Government Affairs publishes "Tips for Effective Communication With Legislators," a part of the Voluntary Bar Leaders Handbook. These tips include information on developing legislative presentations, effective communication with legislators and the importance of advance materials. The Florida Bar's website also provides information on grassroots advocacy, including a list of attorney legislators, a glossary of legislative terms and links to legislative information.

The Florida Legislature also provides legislative advocacy information including an explanation of the committee process, a glossary of terms and tips for communicating with your local legislator. The site recommends the following tips to facilitate meaningful contact with legislators:

1. Know who your representative and senator are and how to contact them. Local and Capitol contact information can be found at *www.flsenate.gov* and *www.myfloridahouse.gov*.
2. Contact your legislators before the Legislature takes action.
3. Use concise, single issue communication about a bill's effects on your life, business and clients.
4. Suggest a course of action and offer technical assistance.
5. Prepare a one-page fact sheet on the particular issue.
6. Send personalized letters instead of form letters.

Now that the 2010 legislative session is over, the section's work on the 2011 legislative agenda and advocacy has begun. In a time when budget cuts and policy changes can so dramatically affect elder law attorneys' clients, it is vital that the section's members get involved and stay involved. Join a committee, meet your local legislative delegation, be familiar with the section's legislative agenda and advocacy, stay in touch with Dr. Batchelor and bring concerns to the section's leadership.

Mark your calendar!

October 7 - 9, 2010
Elder Law Section Retreat
Eden Roc Hotel (561/655-6611), Palm Beach, Fla.
Executive Council Meeting – Thursday, 6 p.m.

January 13 - 14, 2011
Elder Law Certification Review Course
Reunion Resort, Orlando, Fla.
Executive Council Meeting – Thursday, 6 p.m.

April 1, 2011
Public Benefits – Webcast
Tampa, Fla.
Executive Council Meeting – Thursday, 6 p.m.

June 24, 2011
The Florida Bar Annual Meeting
Gaylord Palms, Orlando, Fla.
Section Chair's Training – 11 a.m.
Awards Luncheon – 12 noon
Executive Council Meeting – 2 p.m.

October 6 - 8, 2011
The Elder Law Section Retreat
The Breakers, Palm Beach, Fla.

'Safeguard Our Seniors' legislation passes

by Jana McConnaughhay

J. MCCONNAUGHHAY

First, the good news: Our elderly clients finally have new protections against financial fraud. Here is how it came about:

On Oct. 6, 2008, the Safeguard Our Seniors Task Force met for the first time in Tampa, Fla. CFO Alex Sink created this group of industry and consumer representatives to review and recommend solutions for seniors to fight financial fraud perpetrated against them, with a focus on annuities and their misuse. The Elder Law Section was privileged to have been asked to join this group on behalf of our clients.

The group met numerous times over the months that followed, listening to stories of seniors who had been led astray by financial "professionals." The stories these seniors told were heartbreaking; for many, their financial security during retirement had been jeopardized by the actions of financial predators. For all, the embarrassment and anger of having been taken advantage of was palpable.

For three years, proposed legislation that would tighten rules surrounding the sale of financial products to seniors was sent to the Florida Legislature. Each year these proposed changes were passed easily by the Florida Senate but were held up in committee in the Florida House of Representatives. Finally, in the 2010 session, legislation proposed by Sen. Mike Bennett and Rep. Maria Sachs (CS/CS/CS HB 2176) was passed by both chambers and signed into law by Governor Charlie Crist.

Although not all of the task force's recommendations were adopted (including, most important, a change increasing the criminal penalties for financial abuses of annuities from misdemeanors to felonies), many were. These include:

- Increasing the financial penalty for "twisting" and "churning" of an annuity to a maximum of $75,000
- Limiting the period of a surrender charge for an annuity sold to any customer 65 years of age or older to 10 years, with a maximum charge of 10 percent
- Extending the free look period for an annuity sold to any customer 65 years of age or older from 14 to 21 days
- Authorizing the Department of Financial Services to require an agent to make monetary restitution to a client harmed by the unlawful acts of an agent
- Extending the prohibition of a life insurance agent from being the beneficiary of a life insurance policy to the agent's family members and additionally prohibiting such persons from acting as guardian, trustee or attorney-in-fact
- Allowing the use of video depositions in administrative hearings involving a senior consumer

These provisions take effect Jan. 1, 2011. The bill passed the House 119-0 and the Senate 37-1. The governor signed the bill on June 1, 2010.

It is hoped that continued efforts will be made to increase criminal penalties for financial wrongdoers, but for now the work of the task force is complete and was successful, thanks to the hard work of CFO Sink's office and Sen. Bennett and Rep. Sachs. For more information regarding the task force or its activities, please email Jana McConnaughhay at i*nfo@mclawgroup.com.*

Jana McConnaughhay *was appointed by CFO Alex Sink to serve on the Safeguard Our Seniors Task Force as the representative of the Elder Law Section. She is board certified in elder law and practices in Tallahassee, Fla.*

MARK YOUR CALENDARS!

2010 Elder Law Section Annual Retreat

October 7 - 9, 2010, Eden Roc Hotel, Miami Beach, Florida, Historic Gateway to South Beach!

Watch your mail for registration information.

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ELS takes legislative position on veterans' rights

by Jack M. Rosenkranz, chair, Veterans' Benefits Subcommittee


J. ROSENKRANZ

The Elder Law Section decided at its Executive Council meeting to support a lobbying effort to change Florida Statute 296.37 to eliminate problems affecting married Medicaid-eligible veterans who reside in state veterans' nursing homes.

There is a disconnect between existing Florida law and federal law regarding treatment of the Veterans Aid and Attendance Pension Benefit and/or unreimbursed medical expenses for residents in a state veterans' nursing home.

Under Florida Law, Section 296.37, Florida Statutes, every resident of a state veterans' nursing home who receives a pension, compensation or gratuity from the United States government or income from any other source of more than $35 per month is required to contribute to his or her maintenance and support according to a schedule of payment determined by the administrator and approved by the director. This statute makes no distinction between a veteran with a spouse or a child and a veteran with no spouse or child.

For many years now, federal law has eliminated this issue for married veterans. Under the Balanced Budget Act of 1997 and currently codified at 42 U.S.C. §1396a (r)(1), for a veteran who does not have a spouse or a child, or a surviving spouse who does not have a child, who has been determined to be eligible for medical assistance under the State Medicaid plan and who receives a veteran's pension in excess of $90 per month while residing in a state veterans' home, any such pension payment, including any payment made due to the need for aid and attendance or for unreimbursed medical expenses that is in excess of $90 shall be counted as income only for the purpose of applying such excess payment to the state veterans' home's cost of providing nursing home care to the veteran or the veteran's spouse. In the situation where the veteran does have a spouse or a child, this provision does not apply.

In Department of Children and Families Transmittal No. P-03-02-0005 and its policy manual, the state agency charged with administering the State Medicaid Program instructed its eligibility workers to follow federal law for veterans who reside in state veterans' nursing homes in calculating the patient's responsibility. Unfortunately, the state veterans' nursing home is under no such constraint when developing its schedule of payment. It applies Section 296.37, Florida Statutes, in a manner that is detrimental to veterans and their families and is inconsistent with the federal mandate.

The section will keep members posted on legislative efforts to influence the change in Section 296.37, Florida Statutes, to make it consistent with federal law and to guarantee that married Medicaid-eligible veterans residing in state veterans' nursing homes are afforded the same dignities that a Medicaid-eligible veteran who resides in a private nursing home receives.

Since 1991, ***Jack Rosenkranz*** *has concentrated his practice on elder law and veterans' rights. He became active with the Elder Law Section at the time of its formation and has served in various capacities on the Executive Council at the request of numerous section chairs.*

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

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Member news

G. BERNSTEIN

Attorney **Genny Bernstein** has been admitted to practice before the U.S. Supreme Court. Ms. Bernstein is a Florida Bar certified elder law attorney with The Karp Law Firm PA, an elder law/estate planning firm with offices in Palm Beach Gardens, Boynton Beach and Port St. Lucie.

* * *

Charles F. Robinson, certified elder law attorney of Clearwater, Fla., has been accredited by the Department of Veterans Affairs for the preparation, presentation and prosecution of claims for veterans' benefits. He has also been appointed by Florida Governor Charlie Crist to a two-year term on the Department of Elder Affairs Advisory Council because of his expertise, experience and success in the area of elder law. The council serves in an advisory capacity to the secretary of DOEA, assisting the secretary with carrying out the purposes, duties and responsibilities of the DOEA, as specified in Section 430.05, Florida Statutes. Charlie also was elected as District Five representative to the Florida Council on Aging's board of directors. This organization is committed to serving Florida's diverse aging population through education, information-sharing and advocacy. Charlie's practice centers on asset protection planning for Medicaid qualification, in addition to probate and trust administration.

C. ROBINSON

Congratulations to our ELS award winners!

Elder Law Section Member of the Year

Howard Krooks, Esq.
Elder Law Associates
Boca Raton, Fla

Charlotte Brayer Award Winner

Carolyn Sawyer, Esq.
Sawyer and Sawyer
Orlando, Fla.

In Recognition

These attorneys and firms financially support the Joint Public Policy Task Force, A Partnership of the Academy of Florida Elder Law Attorneys and the Elder Law Section.

The Task Force and your peers need support in order to further the Task Force's accomplishments on ***all*** our behalf and for the future of our practices. Recognition of your contribution will appear in all future issues.

Benefactor $5,000 and above

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The Hook Law Group PA
Joan Nelson Hook

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Sam W. Boone, Jr.
Borgersen, Low & Associates
Randy C. Bryan
Elder Law Associates PA
Ellen S. Morris and Howard S. Krooks
Kathleen Flammia
Carolyn Landon
Osterhout, McKinney, Prather & Swank

Patron $1,500 – $2,499

Berg and Associates
Law Offices of Barbara Buxton
Linda R. Chamberlain
The Estate, Trust & Elder Law Firm PL
Alice Reiter Feld
Karol, Hausman, Sosnik & Finchum LLP
The Karp Law Firm
Arlene Lakin
Mark W. Mazzeo
Allen L. Poucher, Jr.
Sawyer & Sawyer PA
Scott R. Wallace

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Pamela M. Burdick
Dean S. Bress
Colleen M. Duris
Emma S. Hemness
Kotler Law Firm PL
Mondschein & Mondschein PA
Robin M. Peterson
Walter B. Shurden
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How to draft and use DRA compliant promissory notes

by Howard S. Krooks and Michael J. Amoruso[1]

H. KROOKS

As we all know, on Feb. 8, 2006, President George W. Bush signed the Deficit Reduction Act of 2005[2] (the DRA) into law. Portions of the DRA constitute the first monumental changes to the Medicaid eligibility rules since OBRA 1993. By now, most states have adopted enabling legislation and/or rulemaking implementing the DRA, with only a handful of states yet to do so. To assist the states with interpreting the DRA, the Center for Medicare & Medicaid Services issued a transmittal on July 27, 2006 (Transmittal SMDL # 06-018), arguably to clarify the federal government's position on the DRA transfer of assets provisions.[3]

We in Florida approached the new DRA provisions with trepidation, not knowing how or when the DRA would be implemented. Yet, one area where the elder law bar considered there to be an expanded planning opportunity was in promissory note planning. Since December 2004 (later extended to March 2005), the Florida Department of Children and Families effectively eliminated the use of all promissory notes as a planning tool via the issuance of the now infamous promissory note transmittal. Then along came the DRA, with provisions that seemed to revive the use of notes in the planning process by setting clear guidelines, which, if followed, deemed the use of a note *not* to be a transfer of assets subject to a penalty period. Given these changes, an opportunity existed for Florida elder law attorneys well versed in these sophisticated Medicaid eligibility rules to provide clients with an additional asset preservation solution. This article will provide an overview of the rules, drafting suggestions and tax considerations involving the DRA compliant promissory note in "Non-Partial Return of Funds States" and in "Partial Return of Funds States" (Florida being a Partial Return Funds State).

The promissory note strategy in 'Non-Partial Return of Funds States' versus 'Partial Return of Funds States'

In some states (Florida is not one of them), the post-DRA world resulted in a situation where asset preservation in the crisis planning scenario hinged upon dividing the client's estate into two shares; namely, the "gifted share" and the "DRA compliant share," and then transferring both of these shares out of the client's estate. The need to create these two shares emanated from the state's position that if any assets were returned to the applicant subsequent to the initial transfer of funds (bringing the applicant below the applicable resource allowance), this return of funds rendered the individual otherwise *ineligible* for Medicaid and precluded the triggering of a penalty period under the new DRA transfer of asset rules (let's call these states "Non-Partial Return of Funds States"). Thus, promissory note planning in Non-Partial Return of Funds States had as its primary objective the preservation of the gifted share while utilizing the DRA compliant share (or the share transferred pursuant to the terms of the promissory note) as an income stream to contribute toward the cost of care during the Medicaid penalty period caused by transferring the gifted share. All other factors of eligibility must be satisfied to use the DRA compliant note in crisis planning. Thus, this strategy is only appropriate in Non-Partial Return of Funds States in the situation where the client is in need of long-term care services (defined in some states to mean nursing home level of care, whereas other states follow the federal definition of long-term care as being the type of care provided in a nursing home setting, but which can also be provided in any other type of setting or through a home and community based waiver program). And as we know, the DRA mandates that the Medicaid penalty period on the transfer of the gifted share does not start until the applicant *files* an application for Medicaid and would be eligible for such coverage except for the resulting penalty period. This is the point in time that the individual is receiving long-term care services,[4] and penalty period aside, the applicant is otherwise financially eligible for institutional Medicaid (i.e., non-exempt assets are less than the state's resource allowance and available monthly income is less than monthly medical expenses).[5] If the client meets the level of care requirement and has monthly income that is less than the monthly cost of care, the transfer of the gifted share and the DRA compliant share out of the client's estate will render the client "otherwise eligible" for Medicaid, thereby triggering the penalty period for the gifted share.

The computation of the gifted share and the DRA compliant share requires a careful balancing of the desire to preserve the client's assets, the need to obtain "otherwise eligible" Medicaid status and the ability to ensure payment for the client's care during the resulting penalty period. The key is that the DRA compliant share will return an income stream coupled with the client's income (i.e., Social Security, pension and other income) that is slightly less than the private pay rate for the cost of care

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and will continue paying until the penalty period expires. At that point, the gifted share is preserved and the client is eligible to receive Medicaid benefits.

It should be noted that the strategy may also be used to correct a post-DRA gift by the client made prior to meeting with the elder law attorney. In such a case, where a return of the previously gifted funds is not available, the elder law attorney's focus will shift from determining the gift share (since the client already made the gift) to calculating the appropriate payback timeframe of the DRA compliant promissory note to obtain "otherwise eligible" status, trigger the penalty on the previously made gift and ensure a payment stream during the penalty period.

Since Florida is a Partial Return of Funds State, meaning that a simple return of funds will not affect the "otherwise eligible" status of the individual, the need to use promissory note planning in a crisis situation did not (and still does not) exist. Nevertheless, it seemed rather odd, and a bit incongruous, that the DRA should specify parameters for the use of promissory notes, outlining the circumstances where such notes would not result in a transfer of assets/penalty period, and yet the Florida Medicaid agency refused to allow the use of such notes, declaring informally in discussions with the Joint Public Policy Task Force that notes would nevertheless be treated as an *available resource* (note the distinction between imposing a penalty period and treating the note as an available resource). The story of how Florida Medicaid came to reverse its position on the so-called secondary market issue, thereby allowing Medicaid to take the position that a DRA compliant promissory note could be treated as an available resource, is detailed in a prior article on the subject which appeared in the Spring 2010 issue of *The Advocate*. Once Florida began to allow the use of promissory notes (as per the January 2010 change in the ESS Manual), meaning that a DRA compliant note was neither a transfer of assets for penalty period purposes nor an available resource due to the secondary market issue, the use of notes could be pursued.

So where would we use a promissory note in the planning process? One circumstance that comes to mind is that of a community spouse who could use a promissory note to reduce countable assets to below the CSRA of $109,560, thereby eliminating the need to execute a spousal refusal. For many elderly spouses, the execution of a spousal refusal weighs heavily on their minds, and they would prefer not to proceed in this fashion if we, the elder law bar, could present a viable alternative. The promissory note is such an alternative. By making a loan to a family member in exchange for a promissory note, the community spouse's resources are brought below the CSRA at the point of application for Medicaid benefits for the ill spouse. This unmarketable income stream would constitute income to the community spouse, but not a resource, thereby avoiding the need to file a spousal refusal. Further, once the note is paid in full, because a spousal refusal was *not* filed, the community spouse could then request diversion of the ill spouse's income if necessary to bring the CS up to the maximum MMMNA level.

Another use of the promissory note in a Partial Return of Funds State is where the elder law attorney has concerns about the person designated by the client to receive the "loaned" funds that are intended to be returned. In a Partial Return State, such as Florida, a typical planning example would require that all but just under $2,000 of an individual's funds be transferred to a son or daughter, with the intent that approximately one-half of the funds constitute a gift and the other one-half constitute a pool of funds that are intended to be returned to assist the individual with the payment of long-term care costs while the penalty period is running. What would happen if the son or daughter was involved in a lawsuit and a judgment was entered against him or her? Suppose the applicant's son or daughter needed the funds to cover college expenses for a grandchild. Any one of a number of life events could cause the unavailability of funds that were designated to be returned, and this would cause problems for the elder law plan after the train has already left the station. One way to protect against this result is by entering into a promissory note with the son or daughter, thereby creating a legal obligation to pay back the "loaned" funds, and if no payment is forthcoming, it puts the applicant in a better position vis-à-vis Medicaid because a legal note was entered into and an action to seek the return of the funds

can be brought. It justifies the loan as a legitimate legal transaction that, if it falls apart, gives rise to a possible undue hardship claim should the funds not be paid back as required under the note.

The DRA compliant promissory note

A promissory note is a transaction where one party purchases (the payee) from another party (the maker) the promise to receive a specified sum with interest over a period of time. The DRA explicitly excludes funds used to purchase a promissory note *if* the note

1. has a repayment term that is actuarially sound as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration;
2. provides for payments to be made in equal amounts during the term of the loan;
3. does not permit deferral or balloon payments; and
4. prohibits the cancellation of the balance upon the death of the lender.[6]

Any note that does not comply with *all* of these requirements shall be deemed an "asset" for purposes of the transfer of asset provisions of the DRA, and the value of the transferred asset will be the outstanding balance of the note on the date of application.[7]

Drafting tip - Be certain that the face of the note addresses each of the foregoing DRA requirements. The DRA graciously informs us how a note can avoid transfer of asset treatment, and these guidelines should be strictly adhered to by the elder law attorney.

It is important, however, that the elder law attorney does not get lost in the trees when drafting a promissory note that complies with the DRA. Arguably, even a note that complies with the DRA transfer of asset provisions (meaning that no transfer penalty will apply) still may be deemed an *available resource* for determining Medicaid eligibility.

To avoid treatment as an available resource, the elder law attorney should ensure that the promissory note is not categorized as a negotiable instrument. Proper drafting would suggest that the elder law attorney should draft the note by explicitly stating on the face of the note that it is *non-negotiable, non-assignable and otherwise not transferable* by the payee. These precautions should remove the availability of the note from treatment as an available resource by Florida's Medicaid agency, particularly after the January 2010 alteration to the language in the ESS Manual at Section 1640.0561.03.

Drafting tip - For an added level of comfort, make the note even less attractive to a potential third party buyer. For example: 1) do not provide for acceleration in the event of default; 2) do not provide for an incremental increase in interest rate due to a missed payment or default; 3) do not add a provision authorizing the collection of attorney's fees in the event of default; and 4) do not waive the requirements for presentment, notice of dishonor and protest— make it difficult for a potential third party to enforce the note. Obviously, the import of these suggestions must be thoroughly discussed with the client prior to including them in any document.

Practically, the promissory note is a document that may be easier for the client, the Medicaid caseworker and the elder law attorney to comprehend and use. Unlike a private annuity transaction, the promissory note is not subject to the Internal Revenue Code's annuity factors, linear interpolations, interest rate and calculation of the return of ordinary income and capital gain with each monthly payment. Instead, the promissory note merely requires the calculation of a monthly loan amortization schedule based upon a reasonable rate of interest until the desired time to zero out the note is reached. (In Non-Partial Return of Funds States, this would be at the expiration of the penalty period. In Partial Return of Funds States, this could be any amount of time desired as long as it was actuarially sound.) It is important to remember, however, that the final payment of the note must be scheduled to occur within the life expectancy tables required by the DRA. Further, the state need not be named as a remainder beneficiary with the use of notes as is the case with annuity transactions.

There are, however, tax considerations that must be discussed with the client and his or her income tax advisor. First, the interest received by the payee (our client) will be considered taxable income. In Non-Partial Return of Funds States, during the time the note is repaid, the client will be entitled to take the medical expense deduction, assuming that the long-term care costs exceed 7.5 percent of the client's adjusted gross income. On the other side of the transaction, assuming that the maker deposited the lump sum of principal into an investment account to generate the required interest payment, the interest generated would be subject to income tax for the maker. However, it would be important for the maker to consult his or her accountant to ascertain whether the investment income expenses deduction is available to the maker.[8]

Putting the promissory note into practice

Non-Partial Return of Funds State

First, let's see how a promissory note would operate in a state such as New York, which is a Non-Partial Return of Funds State. Assume the following facts: Client is an 83-year-old woman in a Westchester, New York, nursing home and has $215,000 in cash. The private pay rate is $400 per day. The client's income is limited to Social Security and a VA benefit totaling $1,473 per month. The Westchester regional rate is $10,163 (the applicable divisor, as we call it in Florida), and the Medicaid individual resource amount is $13,800 (the applicable

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resource allowance in New York).

How will a post DRA promissory note strategy assist this client? How does the attorney implement this strategy?

After crunching the numbers to determine the DRA compliant share, the gifted share and the amount to retain in the client's name, the following asset preservation can be achieved:

- **Gift $103,251.76 in April 2010**
  - Causes a 10.16 month penalty period (May 2010 – June 2011)
- **Transfer $101,748 in exchange for a DRA compliant promissory note**
  - Term – 10 Months
  - Interest Rate: 3.25% (April 2010, IRC Section 7520 Rate)
- **Keep $10,000 in client's name since she can have up to the Medicaid resource amount ($13,800 for New York in 2010)**
- **The Promissory Note will "zero-out" in 10 months by paying $10,327 month (principal and interest)**
  - 2010 Private Pay Rate = $12,000 (30-day month)
  - Total income = $11,800 ($1,473 + $10,327 Promissory Note Payment)
  - Medical expenses exceed income by $200 = OTHERWISE ELIGIBLE
- **What is preserved?**
  - $103,251.76 = 51% – of net assets
  - Medical expenses exceed income by $200 = OTHERWISE ELIGIBLE

As the numbers reveal, with the proper guidance from an experienced elder law attorney schooled in the DRA compliant promissory note strategy, the client can properly preserve assets while ensuring that her long-term care expenses are paid with the returning income stream from the promissory note during the resulting period of Medicaid ineligibility caused by the gift.

Partial Return of Funds State

In a state such Florida, which permits a partial return of funds, the promissory note is not essential to achieve a so-called reverse rule of halves planning result. Instead, as I suggested above, the strategy could be used in a spousal planning scenario, whereby assets of the community spouse are made the subject of a note to the extent such assets exceed the CSRA. This allows the CS to avoid executing a spousal refusal and the concomitant emotional distress that goes along with that planning strategy, while achieving the same if not better results from an income diversion standpoint.

Let's assume the same facts as set forth above in our crisis planning scenario in a Non-Partial Return of Funds State such as New York. However, instead of the A/R making the loan, the community spouse makes a loan equal to available assets, less the institutionalized spouse resource allowance, less the community spouse resource allowance. The calculation would look like Table 1, below.

In this case, if the Medicaid eligibility date is May 2010, then the note would be entered into as of that date so as to remove the funds from the name of the CS. Thus, as of the snapshot date, the CS has an amount equal to or less than $109,560 and need not execute a spousal refusal. Then, as long as the repayment terms are such that level payments are required to be made and the note is actuarially sound based on the life expectancy of the CS, the note will be a DRA compliaint promissory note and will not result in a penalty period for purposes of establishing the institutionalized spouse's Medicaid eligibility. In fact, the note could be structured to pay back using a shorter term than might be advisable in a Non-Partial Return of Funds State because we don't need to concern ourselves with scheduling the note payments for any specific length of time (in a Non-Partial Return of Funds State for the length of the resulting penalty period). Thus, a repayment term of two months is conceivable, thereby giving the CS her excess funds back in a relatively short period of time while still avoiding the filing of a spousal refusal.

In addition, the CS could then seek diversion of the institutionalized spouse's income since a spousal refusal was not filed (in Florida, a spousal refusal eliminates the possibility of seeking an increased MMMNA). The diversion could not be sought at the time of the filing of the Medicaid application because while the note payments are being made, the note payments constitute income to the CS, and this additional income would clearly eliminate the ability to seek diversion.

Table 1

$215,000	Available Cash
($2,000)	Less Institutionalized Spouse Resource Allowance
($109,560)	Less Community Spouse Resource Allowance
$103,440	Equals Amount of Promissory Note/Loan

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Endnotes:

1 This article is based upon an article written by Michael J. Amoruso, Esq., which appeared in the *Elder Law Attorney*, a publication of the New York State Bar Association. The article was rewritten to address the use of promissory note planning in the state of Florida.

2 Public Law 109-171 (2006).

3 Dennis G. Smith, "New Medicaid Transfer of Asset Rules Under the Deficit Reduction Act of 2005," Center for Medicare & Medicaid Management, SMDL # 06-018 (July 27, 2006).

4 42 U.S.C.A. § 1396p(c)(1)(C)(i).

5 42 U.S.C.A. § 1396p(c)(1)(C).

6 42 U.S.C. § 1396p(c)(1)(I).

7 *Id.*

8 Consult IRS Form 4952 to determine whether or not applicable.

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Congratulations to our immediate past chair, **Babette Bach.** Babette appeared on the cover and was featured in the June 2010 issue of *West Coast Woman* magazine!

(Cover art provided courtesy of *West Coast Woman*.)

Real estate to the rescue

The tale:

Case #1:

Mr. Smith's wife has been diagnosed with dementia. He has reached the point where he cannot care for her at home and has decided to move to an assisted living facility so they can still be together. However, their combined income is approximately $400 less each month than the cost of the assisted living facility. Also, Mr. Smith is aware there will come a day when his wife will need nursing home care and her income will become part of her patient responsibility. He is concerned he will not be able to meet his own expenses without her income. Their combined assets are less than the community spouse available asset limit of $109,560. He wants to be sure that anything he does now to increase their income stream will not interfere with Medicaid approval down the road.

Case #2:

Mrs. Jones had a stroke. Her children live out of state and are not available to provide her with the care she needs to stay at home. She now needs to be moved into a nursing home. She has saved $80,000, which she has invested in CDs. Mrs. Jones has always intended that these funds would pay for her grandchildren's education. She wants advice on how she can preserve those funds now that she needs nursing home care.

The tip:

In both cases, income-producing property may be the answer. Some investments are not counted as assets for Medicaid purposes. Income-producing property, usually rental property, falls into this category. The rules regarding rental income are discussed in the ESS Manual at 1840.0501 and 1840.0504. For the Medicaid Institutional Care Program, the value of the underlying property is ignored, and only the income stream from the property is counted. Expenses associated with the property can be deducted from the income stream generated by the property before the amount of income to a Medicaid recipient is determined. This is an exception to the gross income rule.

Let's examine Mr. Smith's case. Mr. Smith is not ready to sell his home. He thinks he may want to move back to the house when his wife passes away or if she moves to a nursing home. However, he needs more income to meet his current expenses. He can convert his home to rental property, creating the necessary income. At the same time, he is *not* converting a non-countable asset (homestead) into a countable asset for Medicaid purposes since only the income stream from the property is counted. Therefore, his countable assets will remain below the community spouse available asset limit of $109,560. Even if Mr. Smith decides to stay at the assisted living facility, owning the rental property will not interfere with Mrs. Smith being able to qualify for Medicaid.

Tips & Tales

Kara Evans

Obviously, Mr. Smith will need good advice regarding all of the homestead issues attendant with converting a homestead to a rental property. He will need to be advised that he will lose his homestead tax exemption as well as the exemption from forced sale and the Internal Revenue Code's tax exclusion upon the sale of his primary residence. The home should also be transferred to his name. This will allow him to keep all of the rental income. If the home were to remain in both names, a portion of the rent would become patient responsibility for Mrs. Smith.

Mrs. Jones' situation, while different, can be solved with the same approach. As a single person, she is allowed only $2,000 in assets to qualify for Medicaid. However, it is her dream to send her grandchildren to college, and she is devastated that the money could be lost. For Mrs. Jones, the drop in the market value of real estate is a blessing. She can use her funds to purchase a piece of income-producing property. The income stream from the property will become part of her patient responsibility, but the underlying value, her grandchildren's college money, will be protected. An enhanced life estate deed, also known as a ladybird deed, will avoid the need for probate upon her death.

The Department of Children and Families will calculate the income from rental property in the following manner: The income will be the gross rent less ordinary and necessary expenses. Expenses include real estate taxes, interest on debts, utilities, maintenance, repairs, costs of advertising for renters, lawn service, interest and escrow, homeowners insurance and property management expenses. The income from the property should be the community standard charged by local real estate managers. There is no requirement that the property produce a certain percentage of income per dollar of value. However, the fee paid to a management company should not exceed 10 percent unless the additional charge is standard in that particular location. If an expense should happen to exceed the monthly rental, it can be deducted from the income in subsequent months.

While converting assets to income-producing property will not be the answer to all of your client's income or Medicaid needs, it is a valuable planning tool that should not be overlooked.

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Caregiver concerns

Considerations for families hiring in-home caregivers and warning signs of potential abuse or undue influence

by Shannon Martin


S. MARTIN

It is important for families to know how to find caregivers and to understand what protections are offered by the different options. As an elder law attorney, you may be asked to advise clients and their families when elders need assistance with activities of daily living. This article provides information for families to consider when obtaining in-home care for their loved ones.

In Florida, there are different types of agency licenses, each offering different levels of staffing, background checks, liability insurance and workers' compensation coverage for employees. A nurse registry (NR) or a pool service operates as a "matching" type of service, typically under an independent contractor arrangement, often without workers' compensation and with little guarantee of supervision and coverage. A homemaker companion service (HCS) is not licensed to provide any hands-on care, and workers who provide that assistance, perhaps lifting a client who falls or assisting a client out of the shower, are typically not covered for any resulting liability. A fully licensed home health agency (HHA are the initials in front of the license #) operates as an employer with a defined set of criteria and regulation by the Agency for Health Care Administration (AHCA) to provide a range of services from companion to personal care (and in the case of a "skilled agency," medical, nursing services).

Hiring a private caregiver leaves the employer with little protection. Even if a family gets a recommendation or performs a background check, consider the liability if the person is hurt on the job. Background checks also do not ensure the individual has never done anything wrong, since incidents may not have resulted in criminal charges. There is also little recourse when problems arise, as well as no outside supervision or backup plans.

Once a family or an individual has hired a caregiver(s), there are some important tips to keep in mind, regardless of the type of employment relationship:

- Visit and keep in touch regularly. Remember the caregiver may be with the elder many hours and thus stands to gain substantial influence if you do not make sure outside relationships are maintained.
- Consider hiring a geriatric care manager to visit and oversee the caregiver(s) and be on the alert for any potential problems, especially if you do not live nearby. Care managers can help train and support caregivers as well, in addition to providing an array of coordination services and professional oversight and guidance.
- Watch for red flags such as a caregiver isolating your loved one (withdrawal from usual activities, limiting visitors, insisting on coming along on family outings) or the caregiver disclosing inappropriate personal information (especially problems with money, family issues, health problems) to elicit sympathy. You may notice caregivers are calling your loved one "Mom" or "Dad" or otherwise blurring personal boundaries, or your loved one is making excuses for the caregiver when he or she doesn't show up or otherwise has problems on the job.
- Be concerned if your loved one wants the caregiver to write checks or help with financial matters or if the caregiver is reviewing bank statements or initiating appointments with attorneys or financial professionals.
- Be wary if your loved one wants to change long-held patterns (hiring a new attorney after 20 years, changing doctors, changing estate plans, etc.).
- The most important thing to do is to monitor all caregivers closely so you can notice any concerns early. (It is hoped you have an agency involved that provides some oversight, but you should also be monitoring independently, either yourself or via a care manager.)

Not every incidence of the things listed above necessarily means a person is trying to take advantage of an elder; the caregiver may be trying to be helpful or nice, but these are some things we see regularly in cases of undue influence or abuse. Most caregivers are wonderful people providing a much needed service, but if you have a bad gut feeling, you probably have some legitimate concerns.

These situations can be very hard to remedy if the caregiver already has formed a strong relationship with your loved one. If family members have concerns, they should try talking with their loved one or bringing in a trusted advisor or friend to assist. If the caregiver works through an agency, you should immediately notify the supervisor of any concerns and demand a prompt and concerned response. (If you do not get one, report your concerns to

the Agency for Healthcare Administration.)

A care manager may be able to devise a plan to evaluate and help remedy the situation. He or she often can take a subtle approach but begin to more closely monitor the care giver and build a relationship with your loved one to mitigate the circumstances. The elder may worry about what will happen to the caregiver and have concerns over him or her losing the job, so the elder often will need much reassurance. Many times it can be difficult to overcome if the caregiver has become enmeshed in the situation. Again, be wary of caregivers who take on increasing responsibilities and roles in your loved one's life. Consider carefully the implications when a caregiver offers to "work off the clock" or work privately outside of the agency.

Individuals and families can contact the Florida Elder Abuse Hotline (1-800-96ABUSE) to report concerns regarding abuse (including financial) or neglect. Professionals and those working with clients have a duty to report suspected abuse or neglect. These can be challenging cases, especially when an individual is competent and believes the caregiver has done nothing wrong.

In guiding clients, it is important to help educate them on these issues when the opportunity arises. Knowledge, prevention and monitoring can make a big difference. Still, the sad cases will come across your desk, and unfortunately, many times the damage will be done and the remedies will not be great.

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Resources

www.floridahealthfinder.gov (to look up Florida facilities and agencies' licenses)

www.agingcarefl.org/aging/elderAbuse (Area Agency on Aging, for abuse information)

1-800-96ABUSE (Florida Elder Abuse Hotline)

www.agingwisely.com (for local geriatric care management)

www.caremanager.org (for care managers throughout the country)

Free Medicare and health insurance counseling for elders A great resource for elder lawyers

by Virginia Tanner-Otts


V. TANNER-OTTS

The Florida Legislature created the Florida Department of Elder Affairs (DOEA) in 1991 pursuant to Chapter 430, Florida Statutes. The Department of Elder Affairs has comprehensive responsibilities for administering human services programs for the elderly. A vital program area is the administration and management of volunteer services.

One of the volunteer programs, SHINE (Serving Health Insurance Needs of Elders), is a statewide program created in 1993 that offers free Medicare and health insurance education, counseling and assistance to families and caregivers. The funding for SHINE is based on a grant from the Centers for Medicare & Medicaid Services (CMS). SHINE is part of a nationwide network of state health insurance assistance programs funded by grants from CMS, the federal agency that oversees Medicare. Nationwide SHINE is also known as SHIP. The DOEA administers the program in partnership with the state's 11 Area Agencies on Aging that help coordinate SHINE programs locally. Currently there are more than 400 volunteers throughout Florida.

Elders, their family members, individuals soon to reach the age of 65 as well as the disabled of any age who have questions about eligibility, enrollment, coverage or problems with Medicare Parts A, B, D (prescription drug plans), C (Medicare Advantage Plans), Parts A and B health insurance supplements, long-term care insurance or Medicare fraud have a place to turn. SHINE counselors are not trained as extensively on Medicaid, but they can assist clients in applying for extra help under Social Security as well as the Medicare Savings Programs under Medicaid. SHINE counselors will not promote, endorse or recommend any specific health insurance plan or policy. Also, the SHINE volunteer counselors cannot provide legal or medical advice or opinions.

Statewide, county by county, counseling services are provided in person at counseling sites and via telephone. A listing of counseling sites provided by county is available at the SHINE website, *www.floridashine.org*. Homebound clients can arrange for home visits. The DOEA and Area Agencies on Aging also partner to operate a toll-free Elder Help Line, 800/963-5337, through which the elderly, the disabled and those who provide care for them can access a SHINE volunteer or other valuable programs and services in their local counties. SHINE counselors offer information and assistance on Medicare, including paperwork, bills, filing appeals, eligibility, enrollment and coverage as well as health plan choices or changes, medigap (supplemental) policies, prescription assistance plans and choices and Medicaid information. SHINE counselors will also review an individual's prescriptions with the available prescription drug plans for comparisons of monthly premium costs, deductibles and coverage.

SHINE volunteers can

- Help the client review Medicare and health insurance forms.
- Help the client to compare policies, understand health insurance coverage and get answers to questions.
- Inform the client of rights and options.
- Help the client to navigate the Medicare network.
- Inform the client of free and discounted prescription drug programs.
- Help the client to choose a prescription option that best meets the individual's needs.
- Assist the client with the prescription drug application process.
- Explain how Medicare and other health insurance programs for elders work.
- Help clarify what Medicare does and does not cover.
- Help the client to compare the various types of Medicare plan choices available.
- Help the client in understanding and organizing Medicare bills and statements.
- Assist the client in submitting claims for Medicare and health insurance.
- Help the client to understand the Medicare appeals process so the Medicare client can decide whether or not to appeal a Medicare decision.
- Refer the client to other resources and organizations that can help with Medicare and health-insurance related issues.

SHINE counselors are available to make informative presentations about the counseling services to community groups, churches, health fairs and more. Individuals or groups can be referred to SHINE volunteers via the toll-free Florida Elder Helpline at 1-800-96-Elder (800/963-5337).

If an individual enjoys interacting with people, learning new things and is willing to fill a serious need by volunteering, he or she may wish to become a SHINE volunteer counselor. Individuals interested in becoming a volunteer should contact SHINE to complete a volunteer application, which includes a background check. Applicants must attend an informative orientation session where

they learn more about the SHINE program and the role and duties of a SHINE volunteer. After orientation, new volunteers complete a five-day training course, including pertinent website training, where they learn SHINE counseling skills and technical information about Medicare and other health insurance issues. Thereafter the SHINE volunteer will be mentored by veteran volunteers prior to working with clients on a one-to-one basis. The SHINE volunteer is required to complete regular refresher classes and is required to keep current via updated materials that are forwarded on a regular basis. The SHINE program may be a perfect volunteer opportunity. For more information on volunteering for SHINE, call the Florida Elder Helpline (800/963-5337).

Special thanks to ***Karla McAnaney,*** *SHINE liaison, and Betty Cunningham, area coordinator, for their contributions to this article.*

Virginia Tanner-Otts (Scigliano) *served as school board attorney for the Martin County School Board and as deputy general counsel for the Palm Beach County School Board, after having been an assistant state attorney in Broward County and having clerked for the Honorable Paul Roney, U.S. Court of Appeals for the 11th Circuit, and the Honorable Elizabeth Kovachevich, U.S. District Court. She obtained her BA and MRC degrees from the University of Florida, her PhD in educational administration from the University of Texas at Austin, Texas, and her JD from Cleveland Marshall College of Law, Cleveland State University, Cleveland, Ohio. In addition to her legal experience, she has over 10 years of teaching and administrative experience in community colleges, the private university system and public schools. Upon retiring from the school district, she entered into private practice, focusing primarily on education, employment and administrative law. A major portion of her time is spent as Lake County's local coordinator for SHINE, where she counsels at two sites, is responsible for five sites in Lake County and oversees the volunteers at those sites.*

COMMITTEE REPORTS

Probate Special Committee

Sam Boone, co-chair

Significant changes were made to the Florida Probate Code by the Florida Legislature in 2010. The changes, reflected in HB 1237, are noted below. Many of these changes, such as the issues regarding homestead (certain lifetime transfers of homestead property, decent and devise of homestead property and disclaimer by surviving spouse); spousal rights procured by fraud, duress or undue influence; and judicial construction of a will with federal tax provisions are significant and will, no doubt, be the subject of separate articles in the future.

- Requires the lessor of a safe-deposit box to make a complete copy of any document removed and delivered to certain statutorily defined individuals after the death of the lessee of the box (§655.935);
- Authorizes the filing of a caveat by any interested person before the death of an individual (§731.110);
- Authorizes a surviving spouse to take a one-half tenancy in common, rather than a life estate, if the decedent's homestead property is not devised as authorized by law or the Florida Constitution (§732.401);
- Amends §744.444, F.S., to permit a plenary guardian of property, or a limited guardian of property within the powers granted to it by the court, to seek approval to make an election in accordance with §732.401;
- Provides that a surviving spouse may disclaim the transfer of homestead property (§732.4015);
- Clarifies existing law to provide guidance as to what types of lifetime transfers are permissible under the Florida Constitution and statutory law (§732.4017);
- Provides that the laws used to determine paternity apply when determining whether adopted persons and persons born out-of-wedlock are included in class gift terminology and terms of relationship (§§732.608 and 736.1102);
- Provides that, unless subsequently ratified, a marriage between a surviving spouse and the decedent that was procured by fraud, duress or undue influence does not entitle the surviving spouse to certain rights and benefits related to the distribution of the estate solely by virtue of the marriage (§732.805,);
- Allows a court to modify the distribution under a will where the will erroneously includes estate tax-related formulas (§733.1051);
- Provides that in a hearing contesting the validity of a will, a self-proving affidavit of the will, or oath of an attesting witness, is admissible and is *prima facie* proof of the formal execution and attestation of the will (§733.107);
- Defines formal and informal notice for purposes of the Florida Probate Code, Florida Trust Code and other sections of law:
  - The bill amends the definitions of "formal notice" and "informal notice" found in §731.201;
  - §733.2123 is amended to eliminate the requirement that a copy of the will that is being offered for probate be attached to the formal notice of the petition for administration on interested persons;
  - Amends §731.301(2) to limit jurisdiction over a person served by formal notice under the Florida Probate Code to only the person's interest in the estate or in the decedent's protected homestead;
  - Makes conforming changes to §§733.608 and 735.203 regarding notice to be given in certain situations.

continued, next page

Probate special committee
from preceding page

Housekeeping

- Amends §732.2125 to clarify that, when an attorney-in-fact or a guardian makes an elective share election, the court must first approve the election as being in the best interest of the surviving spouse;
- Amends §655.934 to change reference to "durable family power of attorney" to "durable power of attorney";
- Amends §732.608 and §736.1102 to reference the "laws" related to paternity rather than to the "rules." The term "rules" refers to administrative rules and is inappropriate for use when a law is referring to other laws;
- Amends §733.107 to provide that, in a hearing contesting the validity of a will, the self-proof of the will, or oath of an attesting witness, is admissible and is *prima facie* proof of the formal execution and attestation of the will.
- Amends §733.2123 to remove the requirement that a copy of the will be attached to the formal notice of petition for administration.

Interested planners and administrators will also want to review SB 998, which was the major trust bill for 2010, SB 926 regarding the duties of trustees of irrevocable life insurance trusts (ILITs) and HB 927 involving qualified personal residence trusts (QPRTs).

* * * * *

Veterans' Benefits Subcommittee

Jack M. Rosenkranz, chair

Substantive committee status sought for veterans' rights

In the past year I have had the honor and privilege to serve as chair of the Veterans' Benefits Subcommittee. The goal of this committee has been to alert our members to benefits and care settings available to veterans and to provide educational programs for our members regarding various benefits and their respective eligibility rules. Section members have shown a great deal of interest in veterans and veterans' rights, and we had a strong showing of this interest at the well-attended continuing education program featuring national experts as speakers last fall.

I am proposing the creation of a substantive committee called the Veterans' Rights Committee that can study and make proposals regarding the availability of and eligibility for veterans' benefits. It can also help section members to identify and advocate for the rights of veterans as they relate to government benefits, health care needs, housing and other unique issues veterans face as a result of their government service. To do so would require a change to our bylaws and approval by the Executive Committee as follows:

> (i) Veterans' Rights Committee. The Veterans' Rights Committee shall study and make proposals regarding the availability of and eligibility for veterans' benefits and how the section can identify and advocate for the rights of veterans as they relate to government benefits, health care needs, housing and other unique issues veterans face as a result of their government service.

I am sure many of you, like me, have had a special interest in representing veterans and their families. As time has passed, I have come to appreciate that the veteran has unique needs and rights that are not limited simply to government benefits. The veteran has housing needs and health care needs as well. There is much misinformation in the community, and many elder law attorneys have had to spend many hours learning the correct answers and then educating families, health care facilities and the veterans themselves about these rights. I believe the time has come for the section to recognize the attorneys who deal with these unique issues and to provide them with a forum to enhance the services they provide to veterans.

I invite fellow members to join me in advocating for the creation of this substantive committee. It would allow us, as a section, a forum to share information on veterans' rights and to improve the delivery of legal services to this growing sector of the population of the state of Florida.

Veterans' Rights Committee Goals

The goals of the Veterans' Rights Committee will be to serve the Elder Law Section by

1. Alerting our members to rules regarding attorneys' representation of veterans.
2. Alerting our members to the benefits available to veterans.
3. Providing educational programs for our members regarding the various benefits for veterans and the eligibility rules for each program.
4. Informing members about VA nursing homes, state of Florida veterans' nursing homes, domiciliary care and state of Florida assisted living facilities.
5. Informing members of geriatric health care services available through the VA health care system.
6. Communicating with Florida Department of Veterans' Affairs, National Organization of Veterans' Advocates (NOVA), the National Veterans Legal Services Project (NVLSP) and The Florida Bar's Military Affairs Committee to keep abreast of legislative and regulatory developments as they affect elderly veterans.
7. Providing members with contact information of attorneys certified to represent Elder Law Section members.
8. Providing information on the interface between Medicare, Medicaid, Tricare and the VA health care system.
9. Provide continuing legal education for VA accreditation on topics that enhance section members' knowledge and advocacy skills.

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.

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

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- 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 Jana McConnaughhay at *jana@mclawgroup.com* or 850/385-1246.

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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.

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___ Estate Planning
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___ Tax
___ Financial Products
___ Unlicensed Practice of Law (UPL)
___ Resident/Facility Rights
___ Probate
___ Other _____

Summary of selected caselaw

by Nicholas J. Weilhammer

Hill v. Davis, 31 So. 3d 921 (Fla. 1st D.C.A. 2010).

Appellee filed a petition for administration that claimed he was entitled to be appointed personal representative of decedent's estate because he was decedent's stepson and was nominated representative in the will. The trial court appointed appellee as personal representative and admitted the proffered will to probate. Appellee published the notice of administration and served a copy on appellant, who was decedent's mother. Appellant then filed motions to have appellee removed on the grounds he was not qualified to serve as a nonresident personal representative pursuant to Section 733.304(3), Florida Statutes, because appellee's father had predeceased decedent and was not decedent's spouse at the time of her death and, therefore, appellee was not a lineal descendent of a spouse of the decedent. Appellee responded by moving to strike appellant's motions as untimely because they were not filed within three months after service of the notice of administration as required by Section 733.212(3), Florida Statutes (2007). The court also found that appellant's motions to disqualify were made more than three months after service of the notice of administration, but did not indicate whether this finding was a ground for its ruling.

The court held the trial court could not have denied the motions as untimely because such a ruling would have been contrary to binding precedent of *Angelus v. Pass*, 868 So. 2d 571 (Fla. 3rd DCA 2004), which held that the three-month statute of limitations found in Section 733.212(3) did not apply to bar a petition to remove the nonresident nephew-in-law of the decedent who misrepresented himself as the decedent's nephew and was not qualified to serve as personal representative under Section 733.304. Contrary to the Third District's decision in *Angelus*, there is nothing in Florida Probate Rule 5.310 or Sections 733.304 and 733.3101, Florida Statutes, that would preclude the application of the three-month statute of limitations period contained in Section 733.212(3) to appellant's claim that appellee was not qualified to serve as a nonresident personal representative pursuant to Section 733.304 where the factual basis for the claim was known to appellant and could have been raised within the three-month period. Affirmed.

Timmons v. Ingrahm, 2010 Fla. App. LEXIS 7714 (Fla. 5th D.C.A. June 4, 2010).

At the time of his death in 1999, settlor was married to Myrtle. He had two adopted children, the Timmons, from a previous marriage. Myrtle had four children, none of which was ever adopted by settlor. In his will, settlor created a family trust and a marital trust. The more substantial portion of settlor's estate was placed in the marital trust. Myrtle was the sole income beneficiary of the trusts during her lifetime. She was also empowered, in her sole discretion, to annually remove from each trust, up to $ 5,000 or 5 percent of the principal, whichever was greater. Upon Myrtle's death, the trust's remaining principal (after payment of estate taxes) would be "poured over" into the family trust and distributed in accordance with the terms of the family trust. The family trust provided that upon Myrtle's death, the trust assets were to be divided "into as many equal shares as there are children of mine then living and deceased children of mine leaving issue then surviving." Settlor's will expressly defined "children" to include both his adopted children and Myrtle's children. Myrtle attempted to disinherit the Timmons through the purported exercise of a limited power of attorney granted to Myrtle in the family trust. The Timmons asserted that Myrtle's attempt to disinherit them was ineffective because the limited power of appointment could only be executed in favor of settlor's "lineal descendants," and Myrtle's natural children did not fall within this definition. The trial court denied the Timmons' motion.

In determining the intent of settlor, a technical term used in a trust instrument should be accorded its legal definition, unless obviously used by settlor in a different sense. "Lineal descendant" or "descendant" is defined to mean "a person in any generational level down the applicable individual's descending line." It includes children, grandchildren or more remote descendants but excludes collateral heirs. § 731.201(9), Fla. Stat. (2007). While settlor's will expressly provided for a different definition of the term "children" than its common or legal definition, no similar attempt was made to modify the common or legal definition of the term "lineal descendants." The lack of an attempt to redefine "lineal descendant" reflects an intent to have the term interpreted in accordance with its legal definition. There is no language elsewhere in the will reflecting an intent on the part of settlor to grant Myrtle the power to disinherit his children in favor of her own children. Settlor's testamentary document did not reflect an intent to expand the definition of lineal descendants to include stepchildren. Therefore, Myrtle's purported exercise of the limited power of appointment in favor of her natural children was invalid. Reversed and remanded.

Fernandez v. Fernandez, 2010 Fla. App. LEXIS 7604 (Fla. 3d D.C.A. June 2, 2010).

continued, next page

Caselaw
from previous page

Daughter filed a verified petition to determine incapacity of her mother. The court appointed an examining committee. Two members of the examining committee recommended a limited guardianship, and the third member concluded that no guardianship was necessary. The matter came before the trial court for an evidentiary hearing. Mother and daughter were present, and each was represented by counsel. Other witnesses were also present and testified. The trial court denied the petition to determine incapacity, and daughter has appealed.

The trial court, acting from the best of motives, decided that the hearing would proceed more expeditiously if the trial court conducted the examination of witnesses instead of allowing counsel to do so. The trial court swore the witnesses and denied daughter's request to invoke the rule of exclusion of witnesses. The court called and questioned the witnesses, affording almost no opportunity for examination or cross-examination by the parties. There were no opening or closing statements.

In adversary proceedings, the proceedings, as nearly as practicable, shall be conducted similar to suits of a civil nature, and the Florida Rules of Civil Procedure shall govern. The adjudicatory hearing must be conducted at the time and place specified in the notice of hearing and in a manner consistent with due process. The matter should have been tried as is customary in a bench trial. The parties should have been given an opportunity to make opening and closing statements. Each party should have been given an opportunity to present evidence, call and question witnesses and cross-examine the other side's witnesses. When the guardian ad litem gave her report, cross-examination by the parties should have been allowed. At the start of the hearing, daughter invoked the rule of exclusion of witnesses. The trial court denied that request. The request should have been granted. § 90.616, Fla. Stat. Reversed and remanded for new trial.

Bessard v. Bessard, 2010 Fla. App. LEXIS 6535 (Fla. 3d D.C.A. May 12, 2010).

Son obtained a power of attorney from his father over father's property, and enabled son to make all medical decisions and to execute all acts on behalf of father. Mother challenged the validity of the power of attorney. While the action was pending, father died. Son filed a renunciation of his powers under the power of attorney and filed a motion to dismiss, claiming the action was moot. Son appealed an order granting a motion for attorney's fees and costs filed by appellees, mother and daughter. Mother sought review of an order from the trial court granting son's motion to dismiss her action seeking to invalidate a power of attorney.

The court found that the trial court's order granting mother's request for a temporary injunction and suspending son's powers under the power of attorney, father's death and son's subsequent renunciation of any powers allegedly granted him under the power of attorney rendered the lawsuit moot. However, the effect of these actions afforded mother the remedy she sought in her complaint. Mother was entitled to attorney's fees and costs as the prevailing party under § 709.08(11), Fla. Stat. (2007). Son did not dispute the reasonableness of the amounts awarded, and the record supported the trial court's order. Affirmed.

Fair Hearings Reported

by Nicholas J. Weilhammer

Petitioner v. Respondent, Appeal No. 09N-00056 (May 6, 2009).

The facility admitted petitioner, an elderly gentleman. At the time of admission, petitioner's Medicare Part A was the primary payer of his bill to the facility. The facility assigned a "Medicaid specialist" to assist the family in applying for ICP. The facility's Medicaid specialist met with petitioner's family to go over potential payment sources including income, assets and other insurance coverage. The specialist recommended the family to seek the services of a financial planner for advice on how deal with "spending down" his assets. In September 2008, the specialist submitted an application for ICP on petitioner's behalf. DCF denied this application for excess assets. They submitted a second application, which was denied for the same reason.

The Medicaid specialist informed the family that they should set up a qualified income trust in which to place petitioner's excess income. Petitioner had incurred a bill for services rendered totaling $25,446.50. Because the facility received no payment for this balance, it issued its notice of intent to discharge and transfer petitioner.

At issue is respondent's action of Mar. 31, 2009, issuing a notice of discharge and transfer to petitioner, effective May 1, 2009, for failure to pay for services rendered. Respondent bears the burden of proof in this appeal.

The evidence shows that the facility remains unpaid on the balance beginning April 2008 through the date of the hearing. While it is unfortunate that an underlying Medicaid eligibility issue may exist, the fact of the matter remains that the facility must receive payment for services rendered to its residents. Appeal denied.

Petitioner v. Respondent, Appeal No. 08F-08800 (Dist. 12, Unit 88216 May 6, 2009).

ICP applications were filed on Sept. 8, 2008, and Oct. 28, 2008. Both applications were denied as related to transfer of assets. The first application was denied with respondent saying "improper transfer of assets" as the reason. The second was denied with reason "did not receive the information needed … ." During March 2008, petitioner gave her family $18,653.66. This is undisputed, and the figures appeared in a notice of determination of asset (or income) transfer dated November 2008. The document set an ineligibility period as four full months, from October 2008 through January 2009. (Respondent's witness noted that the period should have begun from the September application through December 2008, for a total of 3.7 months, rather than beginning in October 2008 through the full month of January 2009.) The document also informed that rebuttal could be successful if "clear and convincing evidence" established another reason for transfer or existence of undue hardship. A 15-day response time was offered, but response did not occur.

At the time of the transfers, petitioner lived independently in a HUD (Housing and Urban Development) apartment. She was 92 years old, took some medications, was under a physician's care, attended to her own shopping and hygiene and had a weekly monitoring visit from a nurse. During March 2008, her children did not live with her and had their own financial difficulties. At issue was whether or not denial of SSI - Related Medical Assistance was correct in the Institutional Care Program due to transfer of assets.

Petitioner states the funds were transferred while petitioner would not have been anticipating any need for long-term institutional care, and transfer occurred solely to help her financially troubled children. Respondent believed the rebuttals were unsuccessful because insufficient evidence established that transfers were unrelated to creating Medicaid eligibility. The regulations would provide for an ineligibility period of 3.7 months, following transfer of $18,653.66, if the rebuttal were unsuccessful. It is evident that if petitioner had retained ownership, the $18,000+ could have been used for her own needs, in a foreseeable time of declining health, when she had no known medical care supplement other than Medicare and no known reason not to anticipate life's customary and serious health adversities. She was under medical care, had weekly nursing visits and lived alone without live-in help of any sort. Her children may have been suffering financial obstacles, and that may have been a factor in the transfer. Desire to distribute assets before death, to achieve a sort of pre-death inheritance, may also have been a factor. The children's misfortunes in the face of petitioner's own obvious age and other difficulties do not reflect or establish that transfers occurred solely unrelated to creating Medicaid eligibility. There was no indication of how petitioner would have met her own needs without her own money in the face of normal factors of her own advancing age. Desire to help her unemployed and struggling adult children may have been kindhearted, but it falls short of a reasonable explanation as the sole cause for transfer, given petitioner's real and obvious circumstances at the time. Rebuttal standards were not met.

Appeal denied, but the ineligibility period is shortened to 3.7 months rather than four and shall begin September 2008, not October 2008.

Petitioner v. Respondent, Appeal No. 09N-00015 (May 5, 2009).

Petitioner was a resident of the facility since June 20, 2008. Petitioner requires skilled nursing care. He requires total care as he cannot ambulate or perform any activities of daily living. He must be fed by the facility's staff as he cannot feed himself. He cannot move his arms or legs. Petitioner is verbally abusive to the facility's staff and uses profanity. Petitioner makes inappropriate racial comments.

The facility believes petitioner's behavior disrupts the entire unit and believes some staff members have already quit because of petitioner's abusive verbal behavior. Petitioner has been on a diabetic diet. However, he has been noncompliant with his diet and refuses to eat some items on his diabetic diet. Petitioner is verbally abusive to the facility's staff when he does not get what he wants to eat. Petitioner's physician tried to get petitioner to follow his diet but was not successful.

Respondent, by nursing home transfer and discharge notice, notified petitioner of its intent to discharge him, effective Feb. 9, 2009.

At issue is whether or not the action by the facility to discharge petitioner, on the basis that the safety of other individuals in the facility was endangered, is correct. The facility has the burden of proof to establish by clear and convincing evidence that the discharge is appropriate under federal regulations found in 42 C.F.R. s 483.12. The findings show petitioner is a quadriplegic. He requires total care and cannot perform any of the activities of daily living. Petitioner is verbally abusive. However, the hearing officer cannot find that the safety of staff or other individuals in the facility is endangered because of petitioner's verbal abuse or threats. When the health or safety of other residents or facility employees is endangered, the circumstances must be documented in the resident's medical records by the resident's physician or the medical director if the resident's physician is not available. There was no evidence presented from petitioner's medical records that documented that petitioner's physician or the medical director determined that petitioner's behavior created an unsafe or dangerous situation for other individuals in the facility. Petitioner is to be allowed to remain at the nursing facility. Appeal granted.

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