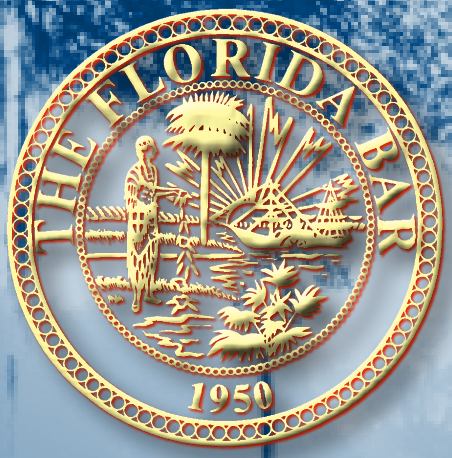

The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Inside:

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The Elder Law Advocate

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A publication of the Elder Law Section of The Florida Bar

COVER ART
"Dancers"
Photo by Nicholas Weilhammer
January 30, 2011
Tallahassee, Fla.

Contents:

The deadline for the SPRING ISSUE is March 1, 2012. 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@mccarthysummers.com, or call Arlee Colman at 800/342-8060, ext. 5625, for additional information.

Let's work together to achieve

It is early in the morning as I gather my thoughts to write my first message as the new chair of the Elder Law Section. After being on the job for approximately two months, I have quickly realized this is more than a job; it's an adventure. I would like to accomplish many things during this short year, but I also realize that if I try to be too ambitious, I will probably accomplish very little.

I joined this section in 1996, at the request of my good friend, and then chair, Richard Milstein, Esq., and I have been an active member ever since. I have seen the section evolve and transform itself into an active advocate for the elderly and the disabled. I ponder what I have learned from the prior chairs I have known, and I wonder if I am up to the task of filling the shoes of my predecessors as the 21st chair of the Elder Law Section. I have already chaired two executive council meetings, and I am proud to say our committee chairs are very much involved and committed to tackling the different issues we face as a section and as the protectors of the elderly and the disabled. I have been given the task by my predecessor, Leonard Mondschein, Esq., to start leading this section into the next 20 years. This is not an easy task. The next 20 section chairs, as well as the section members, must rise to the challenge and take advantage of the many opportunities that will be presented as well as the obstacles we will encounter along the way.

I believe that to better address the needs of the elderly and the disabled, this section must continue to seek more minority members and encourage them to participate actively within the section's leadership. I have the honor and the privilege of being the first ethnic minority to serve as chair of this section. I believe the section recognizes the potential benefits that an increased and diverse membership will offer to our clients. Therefore, we will continue as a section to strive to reach this goal.

As an adjunct professor of elder law at St. Thomas Law School, I have the opportunity to introduce future attorneys to the practice of elder law. I have had the pleasure of seeing many of my students pursue the practice of elder law and become proficient. One of the things I tell my students when I start a new semester is that there is job security in elder law. As more than 75 million baby boomers rush into retirement, the need for elder law attorneys can only increase. As a section, we need to understand the needs of the elderly and guide our members in the fulfillment of their duties as elder law attorneys. An elder law attorney needs to have competency in many areas of the law to be better able to provide our elderly and disabled clients with the proper representation.

Message from the chair

Enrique Zamora

Notwithstanding the common misconception, elder law is not just about helping our clients obtain public benefits. It includes many other areas such as probate, guardianship, trust administration, estate planning, employment discrimination, retirement planning, housing counseling, resident rights advocacy, the ever-present elder abuse and much more. We need to increase our advocacy as a section. We need to continue to support the Public Policy Task Force and continue our lobbying efforts in a tactical and well-orchestrated effort to achieve our objectives. There are many objectives we need to define and attempt to achieve. However, those objectives can only be achieved if we, as a section, work together.

Even though our membership continues to increase, we desperately need more active members who are willing to commit their time and effort to the many committees this section has established for the section to be effective and to make a difference through our legislative efforts. This is why I am using my first message as your chair to ask for help. We are glad you are members of the section. We need your support, but we also need your commitment to donate some of your precious time to help the section move forward. If we are to achieve the predictions of Leonard Mondschein, Esq., my predecessor, for the next 20 years, we need your help. We need to work together; we need to be more involved; we need more board certified elder law attorneys. I realize that studying and taking another Bar exam may not be a top priority for a practicing attorney. However, preparing to become certified is an opportunity to understand elder law better. It is also an opportunity to serve your clients better by being able to spot the issues that perhaps only the broad training required to pass the certification exam can provide.

We have a list of objectives we recognize today as important for the section. And I am sure more objectives will be identified as we move forward. That is why I take this opportunity, as your new chair, to ask you to get involved. Let's work together to achieve.

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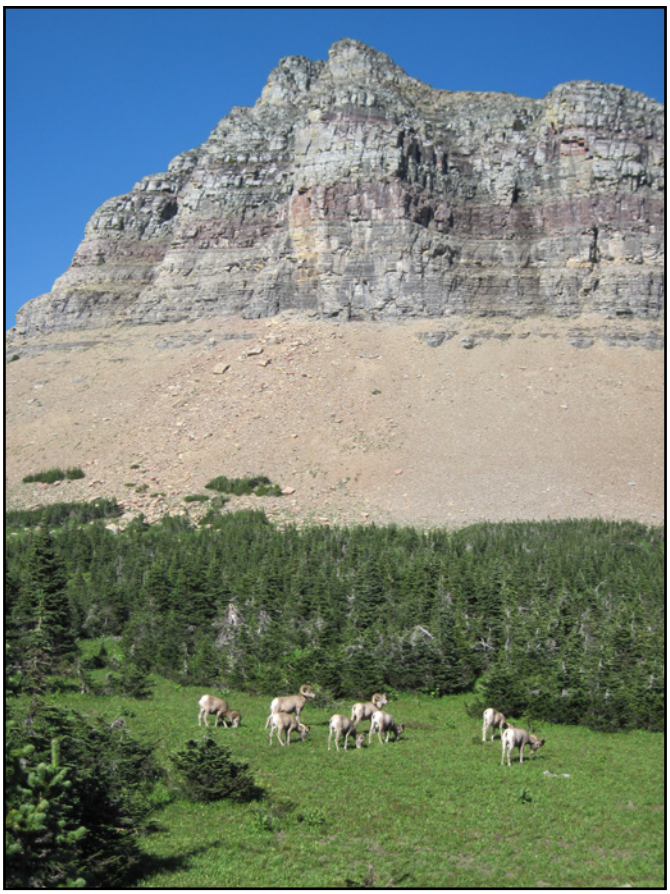
2012 Elder Law Section Retreat: Glacier National Park

Nature v. Those We Nurture

by Twyla Sketchley

Glaciers, stars, mountain streams, wildflowers and grizzlies are all going to be a part of the 2012 Elder Law Section Retreat to be held in Glacier National Park in Northwest Montana, Aug. 7-13, 2012. Co-chairs Emma Hemness and Twyla Sketchley (chair-elect of the section) are working to develop a unique, beautiful and, for those who wish, family-friendly retreat with CLEs.

Glacier National Park was established as the United States' 10th national park by President Taft in 1910. Nestled in the Rocky Mountains and straddling the United States/Canadian border in northern Montana, Glacier National Park is home to one of the largest remaining grizzly bear populations in the lower 48 states. Within the park's borders, attendees may see moose, northern bog lemmings, mountain goats, harlequin or "clown" ducks, water ouzels, wolves, wolverines, ptarmigans, lynx and even tiny pygmy shrews that weigh as much as a dime. The park is home to many threatened and endangered flora and fauna species, and its scenery is breathtaking.



Beautiful Glacier Park. Photo by Emma Hemness

Among the many activities attendees can enjoy are ranger guided tours, hiking trips to Iceberg Lake, bird watching, bear watching, boat tours of the park's lakes, Logan Pass visits, horseback riding and Blackfeet Indian cultural tours. Every visitor should take the time to cross the park using Going-to-the-Sun Road. It runs from St. Mary to Logan Pass and winds around the side of the mountains up to the Continental Divide, sometimes 600 feet above the canyon below. To view the park's stunning scenery while enjoying a spectacular ride, attendees can take the Red Bus with its open windows and roof. The Red Bus is a Glacier National Park icon and one of the oldest passenger carrying vehicles anywhere. For photos of and more information about Glacier National Park and all its wildlife and activities, visit *www.nps.gov/glac/index.htm*.

A unique CLE agenda is being created under the theme *Nature v. Those We Nurture*. We anticipate all formal programs will be audio-recorded in advance, to be downloaded to attendees' MP3 players so that attendees can listen to the lectures while hiking or on day excursions. These formal CLEs will be complemented with daily group exercises involving the formal CLE topics as well as certain stress management, professionalism and ethics issues. Some of the proposed topics:

- Creating a Pet Trust for Your Favorite Grizzly Bear
- Critical Thinking Exercise: How Are the Shrinking Glaciers and Florida's Shrinking Medicaid-Covered Services Alike?
- Has Montana's "Right-to-Die" Law Changed the Landscape of End-of-Life Decision-Making?
- Climate Change—There's Nothing Warm About the Climate Toward Social Welfare Programs
- How Introducing Clients to Grizzly Bears Early Can Improve the Attorney/Client Relationship
- Northern Bog Lemmings and What They Know About Long-Term Care

We may also arrange a tour of the Montana State Veterans Home and

continued, next page

Glacier National Park
from preceding page

cemetery located near Kalispell. In addition, part of the week's activities will include a one-of-a-kind scavenger hunt, so all attendees must bring their cameras and be prepared to engage in a variety of nature-centered, stress-management activities. More information, an agenda and the cost of the CLE will be released as we get closer to the event.

The section is in the process of securing rooms within Glacier National Park for the retreat. Lodging is extremely limited within the park, and the accommodations are quite rustic. Some have only two twin beds, and all have the possibility of attendees sharing accommodations with wildlife. Aug. 7-9 accommodations will be near West Glacier. Then attendees will cross over the park for accommodations in the Many Glacier area (upper northeast portion of the park) for Aug. 10-13.

We are taking reservations for rooms on a first-come basis. If you are not 100 percent sure you will be able to commit to making this trip, PLEASE DO NOT reserve a room at this time. There will be plenty of lodging OUTSIDE the park about 30 to 45 minutes from the west entrance to Glacier in Kalispell or Whitefish. To reserve a room, contact Emma Hemness via email, *hemnesselderlaw@aol.com*. If interested in staying in the park, attendees must notify Emma as soon as possible. Rooms are available on a first-come basis. Then we will keep a waiting list.

If you are a camping enthusiast (the kind that camps in a tent), there are also camp grounds available in and near the park. If you wish to camp in the park, you should reserve your spot in advance. Information on camping within the park is available at *www.nps.gov/glac/index.htm*.

To travel to Glacier National Park, one would fly into Kalispell, Mont. Since this is a small airport, airfare will likely run $500 to $550 per person roundtrip from Florida. Based upon past trends, airfare should be booked no later than April 2012. We will provide helpful hints at securing the best airfare as time gets closer.

So, grab a jacket, some bear bells and your camera and make plans to learn a lot and enjoy yourself at the 2012 Elder Law Section Annual Retreat: Glacier National Park, Aug. 7-13, 2012.

MARK YOUR CALENDAR!

January 12–13, 2012
ELDER LAW CERTIFICATION REVIEW
Reunion Resort, Orlando, Fla.

* * *

Thursday, January 12, 2011 • 6:00–7:30 p.m.
EXECUTIVE COUNCIL MEETING

* * *

February 10, 2012
MAKING HEALTH LAW IN THE SUNSHINE STATE: DO (AND SHOULD) ETHICS INFLUENCE POLICY MAKING?
FSU Alumni Center, Tallahassee, Fla.
(http://med.fsu.edu/?page=innovativeCollaboration.home)

* * *

Thursday, April 12, 2012 • 6:00 – 7:30 p.m.
EXECUTIVE COUNCIL MEETING

* * *

Friday, April 13, 2012
ANNUAL PUBLIC BENEFITS
Live With Simultaneous Webcast
Tampa, Fla. (hotel to be announced)

Friday, May 4, 2012
AFELA ELDER LAW CONCERT
Tampa, Fla.

* * *

Friday, May 11, 2012
AFELA ELDER LAW CONCERT
Fort Lauderdale, Fla.

* * *

Friday, June 22, 2012
ELDER LAW SECTION ANNUAL MEETING
Section Chair's Training – 11 a.m.
Awards Luncheon – 12 noon
Section Executive Council Meeting – 2 p.m.

* * *

August 7-13, 2012
ELDER LAW SECTION RETREAT
Glacier National Park, Montana

ELS and St. Thomas University School of Law host student reception

On Friday, Nov. 4, 2011, the Elder Law Section of The Florida Bar and St. Thomas University School of Law hosted a student reception titled "Life After Law School: Expectations of New Elder Law Attorneys." The evening was headed by ELS Chair Enrique Zamora and moderated by Collett Small, who coordinated the event.

In addition to the many South Florida elder law attorneys, St. Thomas law deans and professors, and students of South Florida law schools who were in attendance, the Honorable Maria M. Korvick, the Honorable Arthur Rothenberg and General Magistrate Lewis Kimler also attended and shared their warm words of wisdom and advice. On the panel of distinguished speakers were the Honorable Maria M. Korvick, administrative judge of the Miami-Dade County Probate Division; David Mangiero of Palmer, Palmer, and Mangiero; and Mark Wolff, St. Thomas professor of law. The panel discussed many topics targeted specifically for current law students and newly admitted attorneys interested in the field of elder law.

After the panel presentations ended, the floor was opened for a Q&A session, which was followed by a cocktail reception. This event was a great success, and the Elder Law Section, along with St. Thomas University School of Law, looks forward to making it an annual event.

Enrique Zamora, chair of the Elder Law Section of The Florida Bar, addresses the group about the expansion of the field of elder law and the importance of striving to become board certified in the field.

Dean Douglas Ray, dean of St. Thomas University School of Law, welcomes the panel, students and attendees to St. Thomas and speaks on the importance of elder law in South Florida.

Collett Small, moderator of the event, welcomes everyone to "Life After Law School" and introduces the distinguished panel.

continued, next page

Student reception
from preceding page

Tax Professor Mark Wolff speaks on the topic of if, and how, law school prepares students for the legal practice.

The Honorable Maria M. Korvick speaks on the topics of what probate judges expect from new lawyers and the importance of finding mentors and learning the local rules of court.

David Mangiero addresses the topic of establishing your own elder law practice and what he would have done back then, had he known then what he knows now.

Member news

Howard Krooks participates in guardianship summit

Howard S. Krooks, J.D., CELA, CAP, participated in the Third National Guardianship Summit: Standards of Excellence, a working event sponsored by the National Guardianship Network, designed to spur needed guardianship reform throughout the country. The Summit was held at the Utah University S.J. Quinney College of Law in Salt Lake City, Utah, Oct. 12-15, 2011. The Summit drew together invited participants who were required to submit extensive, law review-type articles. In the mix were professional and family guardians, judges, attorneys, aging and disability advocates, adult protective services staff and others. The Summit focused intensively on post-appointment guardian standards of practice and decision-making—with the expressed goal of producing key recommendations for use in law, practice, education and research. The law review articles and key recommendations will be published in the Spring-Summer 2012 edition of the Utah Law Review.

MARK YOUR CALENDAR!

Watch your mail and the section's website for registration information.

2012 Elder Law Section Annual Retreat

August 7-13, 2012, Glacier National Park, Montana

A primer on Medicaid services for persons with developmental disabilities

by Nancy E. Wright

For attorneys representing clients who have developmental disabilities (or who have family members with disabilities), it is important to understand the Medicaid programs that provide essential services that keep these individuals out of institutions. Even if your focus is on Medicaid financial eligibility only, your clients may need to know where to turn when their services are unexpectedly terminated or altered for reasons they don't understand.

In Florida, the most significant services are provided through the Developmental Disabilities Home and Community-Based Service Medicaid Waiver (DD Waiver). Operated by the Agency for Persons with Disabilities (APD), this program now has an enrollment of approximately 30,000 people, with another 20,000 determined to be eligible but on a waiting list. Over the last decade, the DD Waiver has been in a continual state of change, with another overhaul currently in process. As advocates, we need to monitor those changes and how they are implemented to ensure compliance with federal and state laws.

The following offers a brief overview of the DD Waiver program.

How is eligibility determined?

To qualify, an individual must meet all of the following criteria, set forth in F.S. 393.063:

- Be over the age of 3;
- Have been diagnosed with one of six different developmental disabilities that occurred before the age of 18: mental retardation (IQ of 59 or less, or between 60 and 69 with a handicapping condition), cerebral palsy, autism, spina bifida, Prader-Willi syndrome or Down syndrome; and
- Have substantial limitations in at least three life activities: self-care; learning; mobility; self-direction; understanding and use of language; and capacity for independent living.

Like all Medicaid programs, there is also an income and asset limit, although the individual is treated as a "household of one" when finances are considered.

What services are offered through the DD Waiver program?

The DD Waiver provides services that allow a person with developmental disabilities to live in the family home, his or her own home or a small group home rather than in an institution. Service options include personal care services and respite, services that provide a "meaningful day activity" (e.g., adult day training), consumable medical supplies (e.g., diapers), durable medical equipment (e.g., a wheelchair), behavioral and mental health services, occupational/physical/speech/respiratory therapies and environmental modifications, among others.

How are services approved?

Each client has a waiver support coordinator who acts as a case manager to help select appropriate services, monitor the service providers and deal with any changes in the client's condition or circumstances. All services must be preapproved and determined to be medically necessary before they are authorized.

How is the DD Waiver funded?

Like all Medicaid programs, the federal government pays more than half of Medicaid expenses. The other portion is provided by the state under a budget managed by APD.

Underfunded and overwhelmed, APD has been struggling with a budget shortfall and pressure to reduce expenditures. The reaction has been a series of measures that have had significant impacts. These have included a "freeze" on all additional services unless a crisis can be shown, drastic reductions in provider rates (some of which were reversed after marches on Tallahassee) and "utilization" reviews that have resulted in still more service cuts.

What are the tiers, and how have they been implemented?

Pre-2008, there were two levels of service. Most individuals were on the "big waiver," where the annual budget was based on all preapproved medically necessary services. About 7,000 people were on the "little waiver" (also known as the Family and Supported Living or FSL Waiver) that had a $14,792 annual cap on services. This more limited waiver was made available to provide some assistance to the families who had been on the waiting list for years.

In 2007, the Florida Legislature voted to restructure the DD Waiver into four tiers (F.S. 393.0661). Tier 1 had no annual cap; Tier 2's cap was $55,000, Tier 3's cap was $35,000 and Tier 4 mirrored the old FSL Waiver. Implementation of the tier system has been contentious, at best. In September 2008, APD notified all 30,000 clients of their new tier placement, resulting in huge service cuts for many. More than 7,000 hearing requests were filed. After litigation on APD's denial of hearing requests and the

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Medicaid services
from preceding page

invalidation of the initial tier rules, new tier placement notices based on new rules were issued at the end of 2009. Multiple appeals challenging these new tier assignments are pending in state district court.

What is the iBudget?

In 2010, the Florida Legislature adopted another approach called the iBudget (F.S. 393.0662). The concept is to use an algorithm derived from an assessment of the person's characteristics—for example, age, living situation, ability to ambulate—to come up with an "individualized" annual budget. Part of the rationale for this approach is to equalize services among people with similar needs. In addition, the individual and his or her family will have more flexibility to make service changes among categories of similar services. Request for services above the iBudget amount will, however, require a high standard for approval.

The Legislature's expectations that iBudget would save APD's budget woes helped keep the developmental disability community out of the Medicaid Reform Act's schedule for long-term managed care. The iBudget is moving forward quickly, beginning with a small pilot project in Leon County and now including clients in APD Areas 1 and 2 (about 3,200 clients). As of Oct. 10, 2011, iBudget amounts have been based on the client's current cost plan, not on the formula derived through the use of an algorithm.

Without much fanfare, APD has already held workshops on a draft for an iBudget Services Coverage and Limitations Handbook. This will ultimately be proposed as a rule and become the working manual for approval of all services.

What is being waived in a Medicaid waiver program?

Administered by the Agency for Health Care Administration (AHCA), the basic Medicaid program is also known as "State Plan" Medicaid because it is provided according to the plan submitted by the state and approved by the federal Centers for Medicare and Medicaid Services (CMS). The Medicaid Act makes certain services mandatory, such as hospitalization and out-patient physician care. State Plan Medicaid is an entitlement program—if you qualify for Medicaid, you must receive medically necessary services.

A state may choose to provide optional services, also listed in the Medicaid Act. Some optional services are offered to all Medicaid enrollees as part of the State Plan. In Florida, those include nursing home services for the elderly and institutional care for persons with developmental disabilities. Like mandatory services, these are an entitlement for any Medicaid recipient who needs the service.

Other optional services, like home and community-based services, are offered to only a select group of individuals under programs with limited enrollment.

To limit services or enrollment, a state must apply to CMS for a waiver of the provisions of the Medicaid Act that would otherwise apply. States are permitted to waive requirements for "statewideness" (all services must be offered statewide), "comparability of services" (services must be comparable in amount, duration and scope across all categories of participants) and "freedom of choice" (participants must be able to select among Medicaid providers). Types of waiver programs include pilot projects offered in only parts of the state (Section 1115 Waivers), Freedom of Choice Waivers, like the use of managed care plans (Section 1915(b) Waivers), and Home and Community-Based Waivers, like the DD Waiver (Section 1915(c)).

Nancy E. Wright *is a sole practitioner in Gainesville, Fla., focusing primarily on the labyrinth of health care benefits for persons with disabilities and on special education law. As a legal services attorney, Ms. Wright facilitated a statewide advocacy effort to defend children and adults with developmental disabilities from significant reductions in services. She also initiated a program to assist homeless clients with applications and hearings to obtain Social Security and Veterans' benefits. Ms. Wright has been a member of The Florida Bar since 1980, after graduating with high honors from Florida State University College of Law. She is a member of the Elder and Health Law sections of The Florida Bar and the Eighth Judicial Circuit Bar, and is licensed to practice before the Florida Supreme Court and the Federal District Court for the Northern District of Florida. She is on the board of Helping Hands, a volunteer medical service for homeless individuals, and the Alachua County Health Care Advisory Board.*

Visit the section's website: www.eldersection.org

What clients don't know about Medicare IS costing them

by Shannon Martin

This year's Medicare open enrollment ran from Oct. 15, 2011, through Dec. 7, 2011 (a change from past years' period of 11/15-12/31 to allow more time and, it is hoped, a smoother process). During this time, Medicare recipients were able to switch Medicare Part D programs (prescription drug coverage) or enroll or disenroll from a Medicare Advantage (MA) plan. From Jan. 1 to Feb. 14, those enrolled in an MA plan can also disenroll and switch back to regular Medicare (the only change that can be made during that period). It is worth each Medicare recipient's time to evaluate current Medicare coverage and to consider alternatives based on his or her specific situation. A recent study in Florida showed almost all Medicare recipients were in the wrong plan and PAYING TOO MUCH. Even if an individual's current plan is appropriate, it is important to understand the coverage, how it works and Medicare recipients' rights.

Several key issues and considerations arise when someone is enrolled (or considering) an MA plan. MA plans are an option to receive a number of the various Medicare benefits via a private insurer instead of the traditional program. Typically these plans have preferred providers or networks (or providers may not accept the coverage due to the reimbursement rates) and may require a primary care physician or have other restrictions. They may also include additional benefits, such as eye or dental care or gym memberships, and the deductibles, co-pays, etc., are usually less expensive for the recipient. If a person is enrolled in an MA plan and is not pleased with the plan/coverage and choices, there are several special enrollment periods to make changes.

One issue many people encounter is the situation where they must get inpatient rehabilitation and do not like the facilities available for skilled nursing under their plan. The OEPI (Open Enrollment Period for Institutionalized Individuals) may help. Persons "institutionalized" (i.e., residing in or moving in and out of a skilled nursing facility and other eligible institutions) have a continual enrollment period. The person can disenroll from an MA plan while in the facility and return to regular Medicare (or a different MA, if it is accepting enrollment) the beginning of the next month. Additionally, there is what is known as the "trial period," which is the first 12 months after someone signs up for an MA plan for the first time. During this time, he or she can choose to switch back to regular Medicare coverage (and get guaranteed issue on a Medigap plan). There are various other special enrollment periods for situations such as moving, becoming eligible or losing coverage from an employer or other entity and plan contract violations. If a client believes he or she truly did not understand the coverage or was misled, it is worthwhile to contact Medicare or an attorney who specializes in this area about rights and appeals.

A major concern arising more often for Medicare recipients is the issue of inpatient hospitalization vs. observation status/outpatient stays. A doctor must write an order to admit a person to the hospital (designating the person as an inpatient); otherwise, the person is considered an outpatient. Someone may be considered an outpatient even if he or she has spent the night (or several) at the hospital receiving ER services, observation services, outpatient surgery, lab tests or X-rays and the doctor has not written an order to admit the patient to the hospital. Medicare Part A covers inpatient services and comes with certain deductibles (in 2011, $1,132 for a total stay of days 1-60), whereas Medicare Part B covers outpatient services, which may mean clients pay individually (typically with 20% copay after meeting the annual deductible) for various tests and services. Admission criteria relates to the intensity of service (IS) needed and the severity of illness (SI). Medicare and its contractors use several medical necessity screening tools to determine if a hospital admission is medically necessary. Ultimately it is up to the physician; however, if the hospital is not being paid for inpatient admissions, it will strenuously attempt to remedy that situation. Most hospitals use McKesson's Interqual criteria, which provide a decision tree to determine whether hospital admission criteria are met. Criteria must be met for Medicare to pay.

The other major concern this brings up is coverage of any inpatient rehabilitation needed after a hospitalization. Medicare will pay for inpatient skilled nursing services only if the recipient has been a hospital inpatient for at least three consecutive days (day of admission counts, but not day of discharge). Observation services DO NOT meet the three-day inpatient criteria, so if a patient or a family does not understand the situation outlined above, it could mean unexpected out-of-pocket costs in the thousands. A hospital-based rehabilitation program may be a consideration in this situation (hospital rehabilitation or long-term acute care hospitals are typically categorized as "hospital days," not skilled nursing days).

The importance of a proper understanding of Medicare benefits and options should not be overlooked. A Medicare analysis and education about the process for persons turn-

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What clients don't know
from preceding page

ing 65 should be an integral part of pre-retirement planning. For current recipients, the enrollment periods provide an opportunity to ensure coverage is still most appropriate, given the likelihood the individual's health has changed and options have evolved.

***Shannon Martin, M.S.W., CMC**, is director of communications for Aging Wisely LLC (www.agingwisely.com). Aging Wisely is a geriatric and disability care management/consultation company. Contact Aging Wisely at 727/447-5845 or jeanninehodges@agingwisely.com.*

Medicaid reimbursement from (d)(4)(A) special needs trusts

by Floyd Faglie

Practitioners are often faced with the need to advise clients about the requirement to reimburse State Medicaid programs at the termination of a (d)(4)(A) special needs trust (SNT). While it is important to advise clients of these requirements at the time of establishing a SNT, and equally important to draft the SNT so it complies with these requirements, this short article will not directly address these issues. Instead, this article will focus on questions that typically arise with expenditures from the SNT prior to reimbursement of the State.

Reimbursement of the State Medicaid program is a well-known critical requirement of a SNT as outlined in 42 U.S.C. §1396p(d)(4)(A). The Social Security Administration's Program Operation Manual System (POMS) provides contours to this statutory reimbursement requirement at SI 01120.203, which for the most part is mirrored in the Department of Children and Families' Economic Self-Sufficiency Manual at Chapter 1640.0576.08.

SI 01120.203B.1.h. provides that the SNT must contain specific language requiring reimbursement to any State(s) that may have provided medical assistance under the State Medicaid plan(s), and reimbursement may not be restricted to any particular State or time. Reimbursement is only limited to the total amount in the SNT or an amount equal to benefits paid on behalf of the beneficiary through the Medicaid program(s). Important to our discussion is the requirement that the State(s) Medicaid program must be listed as the first payee and have priority over payment of other debts and administrative expenses except for those outlined in SI 01120.203B.3.a.

SI 01120.203B.3.a. provides for "Allowable and Prohibited Expenses" at the termination of a SNT. This provision provides that allowable expenses from the SNT before reimbursement to the State include: 1) taxes due from the trust to the State(s) or federal government because of the death of the beneficiary; and 2) reasonable fees for administration of the trust estate, such as an accounting of the trust to a court, completion and filing of documents or other required actions associated with termination and wrapping up of the trust. Expressly prohibited expenses and payments that cannot be made before reimbursement of the State include: 1) taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate; 2) inheritance taxes due for residual beneficiaries; 3) payment of debts owed to third parties; 4) funeral expenses; and 5) payments to residual beneficiaries.

Since the POMS clearly outlines allowed and prohibited expenditures prior to reimbursement of the State, it would seem that the question is answered as to what expenditures can be made from a SNT prior to reimbursing the State. However, at times, questions can arise as to what administrative expenses are "reasonable" and whether a specific payment of "debts owed to third parties" would be allowed. In regard to these questions, guidance may be found in the terms of the trust as to the reasonableness of a particular expense or payment of a debt. In the absence of guidance in the trust documents, SI 01120.203B.3.a., as well as F.S. 736.0708 and F.S. 736.0709, may serve as gap fillers in providing authority to make reasonable expenditures from the trust prior to reimbursement of the State.

Ultimately, however, concerns about any particular disbursement from the SNT prior to State reimbursement can be addressed by requesting court involvement, such as approval of the disbursement by the probate court in closing out a guardianship or by the State's consent to the disbursement. This second alternative can be explored by contacting the Florida Agency for Health Care Administration. Contact with the agency should be through the agency's collections contractor, ACS Recovery Services, P.O. Box 12188, Tallahassee, FL 32317, 877/357-3268. ACS should be willing to allow reasonable disbursement from the SNT prior to State reimbursement, if the expenditure is reasonable and would have otherwise been allowed during the existence of the trust.

***Floyd Faglie, Esq.,** is a partner with Staunton & Faglie PL in Monticello, Fla. His practice is focused on assisting clients in maximizing settlements through aggressive lien resolution and the proper use of special needs trust and Medicare set asides.*

It's that time of year – SSA announces COLAs for 2012

by David Lillesand

Unlike 2009, 2010 and 2011, the standard three-year formula for the cost-of-living adjustments (COLAs) in the Social Security Act results in a 3.6 percent increase in benefits for Social Security and SSI recipients, beginning January 2012. The average benefit for a retired worker will be $1,299 per month and for a widowed mother and two children, $2,543 per month. The maximum benefit paid to a worker retiring at age 66 increases from $2,366 to $2,513 per month ($30,156 per year).

For elder law attorneys, the COLA numbers have more significance. For example, the income cap for Medicaid ICP programs is by law computed as three times the federal benefit rate (FBR). The FBR is the maximum payment to a single person receiving SSI benefits. In 2011, the FBR was $674 per month, so the income cap was $2,022. For 2012, the new FRB is $698 per month. Three times the 2012 FBR yields $2,094, the new Medicaid income cap in Florida.

Also, in figuring the amount of parental income deemed to a disabled child in the SSI income charts, the allocation for the parents is $1,048 if both parents are living with the child and $698 if the child lives with only one parent. An additional allocation is made for the expenses of raising other healthy minor children in the house, computed as the difference between the single FBR of $698, and the $1,048 couple rate, for a permissible deduction from the parents' income of $350 for each healthy child in the family who does not have other outside income (newspaper route, child support from a non-residential parent, etc.).

Some things never change: The SSI resource limits stay at $2,000 for a single person and $3,000 for a couple both receiving SSI.

A full list of the affected changes appears in the chart on the next page.

David Lillesand, Esq., *is a partner of Lillesand, Wolasky & Waks PL, with offices in Miami, Clearwater and St. Petersburg. He is past chair of the Special Needs Trust Committee and a frequent lecturer for NOSSCR, NAELA, ASNP and other state and national organizations on the topics of Social Security, SSI, Medicare and Medicaid, and the application of the Patient Protection and Affordable Care Act to the practice of Social Security and elder law. He and his partner, Marjorie Wolasky, are the authors of Chapter 17, "Special Needs Trusts," in the Florida Bar Lexis / Nexus publication Trust Administration in Florida, 6th edition.*

FACT SHEET – 2012 Social Security Changes

Cost-of-Living Adjustment (COLA):

Based on the increase in the Consumer Price Index (CPI-W) from the third quarter of 2008 through the third quarter of 2011, Social Security and Supplemental Security Income (SSI) beneficiaries will receive a 3.6 percent COLA for 2012. Other important 2012 Social Security information is as follows:

Tax Rate:	**2011**	**2012**
Employee	7.65% *	7.65%
Self-Employed	15.30% *	15.30%

***NOTE:** The 7.65% tax rate is the combined rate for Social Security and Medicare. The Social Security portion (OASDI) is 6.20% on earnings up to the applicable taxable maximum amount (see below). The Medicare portion (HI) is 1.45% on all earnings.*

** Section 601 of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 reduced, for wages and salaries paid in calendar year 2011 and self-employment income in calendar year 2011, the OASDI payroll tax by 2 percentage points, applied to the portion of the tax paid by the worker and the self-employed individual.*

Maximum Taxable Earnings:		
Social Security (OASDI only)	$106,800	$110,100
Medicare (HI only)	No Limit	
Quarter of Coverage:		
Earnings needed to earn one Social Security Credit	$1,120	$1,130
Retirement Earnings Test Exempt Amounts:		
Under full retirement age	$14,160/yr. ($1,180/mo.)	$14,640/yr. ($1,220/mo.)

***NOTE:** One dollar in benefits will be withheld for every $2 in earnings above the limit.*

The year an individual reaches full retirement age	$37,680/yr. ($3,140/mo.)	$38,880/yr. ($3,240/mo.)

NOTE: Applies only to earnings for months prior to attaining full retirement age. One dollar in benefits will be withheld for every $3 in earnings above the limit.

There is no limit on earnings beginning the month an individual attains full retirement age.

Social Security Disability Thresholds:		
Substantial Gainful Activity (SGA)		
Non-Blind	$1,000/mo.	$1,010/mo.
Blind	$1,640/mo.	$1,690/mo.
Trial Work Period (TWP)	$720/mo.	$720/mo.
Maximum Social Security Benefit:		
Worker Retiring at Full Retirement Age:	$2,366/mo.	$2,513/mo.
SSI Federal Payment Standard:		
Individual	$674/mo.	$698/mo.
Couple	$1,011/mo.	$1,048/mo.
SSI Resources Limits:		
Individual	$2,000	$2,000
Couple	$3,000	$3,000
SSI Student Exclusion:		
Monthly limit	$1,640	$1,700
Annual limit	$6,600	$6,840

Estimated Average Monthly Social Security Benefits Payable in January 2012:

	Before 3/6% COLA	**After 3.6% COLA**
All Retired Workers	$1,186	$1,229
Aged Couple, Both Receiving Benefits	$1,925	$1,994
Widowed Mother and Two Children	$2,455	$2,543
Aged Widow(er) Alone	$1,143	$1,184
Disabled Worker, Spouse and One or More Children	$1,826	$1,892
All Disabled Workers	$ 1,072	$1,111

SSA Press Office, 440 Altmeyer Building, 6401 Security Blvd. Baltimore, MD 21235,
Phone: (410) 965-8904, FAX: (410) 966-9973

COMMITTEE REPORTS

Continuing Legal Education Committee

Collett P. Small, chair

The Continuing Legal Education Committee is working on exploring new and exciting ways to increase enrollment in CLEs and to make them more profitable for the section. Stay tuned for these changes.

An elder law networking event titled Life After Law School was held Nov. 4, 2011, at St. Thomas University School of Law. The event drew more than 100 attendees, including students from all area law schools, members of the judiciary and local elder law attorneys.

Save the date

- January 12-13, 2012 – Elder Law Certification Review will be held at the beautiful Reunion Resort and Spa in Orlando. This is the perfect opportunity to get CLE credits, network with your fellow elder attorneys from around the state and get the latest legislative updates.
- May 4, 2012, and May 11, 2012 – AFELA Elder Law Concert will be held in Tampa and Fort Lauderdale.
- August 7-13, 2012 – Elder Law Section Retreat will be held in Glacier National Park in Montana. More information is included within this edition of *The Advocate*.

If you have any questions or ideas or would like to get involved, please contact Collett P. Small at 954/437-4603 or *csmall@small-collinslaw.com*.

Death Care Industry Committee

Philip M. Weinstein, chair

Upswing in cremation linked to emotional stress

Recently published data by the National Funeral Directors Association indicates that the percentage of people choosing cremation will likely surpass 50 percent by the year 2025, with some states already showing over 65 percent preferring cremation to burial. These numbers were in the single digits as recently as 1980, as reported by the Cremation Association of North America.

As cremation increases in popularity, more families are finding themselves with the remains of loved ones on display or simply in a box, with few ideas on what to do with the ashes. Some even choose to spread the ashes in a special place or have them encased in jewelry. Regardless, many people are finding that the lack of a permanent memorial causes emotional distress. An example of this is when a wife honored her late husband's wish to be cremated. She never thought keeping the ashes would be the roadblock to her 12-year-old son's emotional recovery. After 18 months of turmoil for her son, it was recommended they have a service and a burial to start the healing process.

"It was as if the day we buried him, the healing began," his wife says.

By keeping the remains of a loved one in the home, many family members relive the loss every day. It's a constant reminder. Other common practices—like spreading ashes in a favorite spot—are no better, because a traditional site for visitation isn't available. Memorial sites are for the living. They are where people mourn and, ultimately, move past their feelings of grief. As this view broadens, funeral and cemetery providers are seeing an increase in "inurnment," the practice of placing or burying cremated remains.

More people are investing in cemetery memorials for cremated loved ones—or securing property for themselves in advance. As the number of people being cremated increases, more people are requesting permanent memorials for urns. Cemeteries offer dozens of options.

People are realizing that it's best to have a memorial to visit, and many are buying cemetery property for loved ones years after the cremation took place, or they are including a memorial in their own cremation plans.

Financial Products Special Committee

Jill Burzynski, chair

The committee would like to congratulate two of our members who recently got married: Frank Leontitsis and Carrie Fouchia were wed on Oct. 22.

The Financial Products Special Committee meets monthly on the last Tuesday of the month at 4 p.m. to discuss how insurance products affect the elder community. We have recently had lively discussions about the role of the elder law attorney in advising clients about the purchase or retention of annuities and what type of expertise is required to give prudent advice. We have also discussed REITs as one of the financial products we may be exploring in addition to reverse mortgages and long-term care policies.

Our committee is growing, and we welcome new members. Please contact Jill Burzynski at *jjb@burzynskilaw.com* if you would like to join this committee.

Guardianship Committee

Carolyn Landon and Melissa Lader Barnhardt, co-chairs

The Guardianship Committee had a very good meeting

continued next page

Guardianship committee
from preceding page

at the Elder Law Retreat that took place on Sept. 17 at The Breakers in Palm Beach. The following is a summary of what transpired:

The first discussion centered on the removal of the "Right to Bear Arms" upon adjudication and the draft white paper submitted by Stephanie Villavicencio and David Hook. We discussed the "VA list" of gun holders that was challenged by the NRA as a due process issue. We further discussed that there needs to be a focus on "public safety," a determination on who then obtains the right to have the weapon (akin to the driver's license vs. the car itself) and how to describe procedures to assist with that and make it a legal transfer.

The next discussion centered on the various administrative orders related to attorney and professional guardian fees and restrictions on the amount of fees, what services are permissible for billing and how often to bill.

The final discussion centered on a preliminary study on how different states handle joint assets in a guardianship proceeding when the well spouse refuses to cooperate.

All future meetings (via phone conference) will be every other month on the second Tuesday at 8:30 a.m., with the remaining schedule as follows: Dec. 13, Feb. 14 and Apr. 10.

Law School Liaison Committee

Brandon Arkin, chair

This was an exciting year for the committee. We established an official Elder Law Section organization at the University of Miami. We anticipate establishing a similar organization at St. Thomas University School of Law during the next semester. Currently we are in contact with the other law schools throughout Florida and creating various programs to fit the needs of each school. Sam Boone, Jr., recently offered his assistance to help foster the growth of elder law at the University of Florida. We are glad to have him join the various other attorneys who have offered their assistance to the committee. If you or someone you know is interested in helping establish an elder law student-run program or another type of program at your former law school, please contact Brandon Arkin at *brandon.arkin@gmail.com*.

Medicaid Committee

John Clardy and
Emma Hemness, co-chairs

Following the last report submitted on July 1, we anticipated the release of waiver request from AHCA on or about Aug. 1, addressing the expansion of the existing five-county pilot project statewide and mandatory enrollment for nearly all Medicaid beneficiaries, including senior citizens requiring long-term care. Consequently, the waiver request was posted to the AHCA website on Aug. 2, carrying with it a little surprise for most. The long-term care portion of the Medicaid reform legislation was developed separately from the statewide expansion of the initial five-county pilot project, which represented a Section 1115 waiver. The long-term care managed care program has been submitted as a combination 1915 (b) and (c) waiver. The waiver request for expansion of the initial 1115 has yet, as of this report, to be submitted to CMS, with AHCA having requested multiple extensions from the July 31 expiration date of the initial pilot project. As of this report, the AFELA has retained the assistance of a national expert on waivers to analyze the combination 1915 (b) and (c) long-term care managed care waiver request, which will likely be reviewed by this committee upon its completion. In addition, there are

unconfirmed reports that a glitch bill will be proposed in the legislative session beginning on Jan. 10, 2012, for the Medicaid reform legislation (formerly known as HB 7107 and HB 7109).

There are other matters of concern to elder law practitioners that have come to the attention of the Medicaid Committee. These other issues involve the following: Denials and Fair Hearings on applications involving gift and cure strategies; uncertainty regarding DOEA requirements associated with the Nursing Home Diversion program for transition of nursing home residents to assisted living facility residences; additions to the online Medicaid application regarding the preparation of qualified income trusts; and issuance of DCF legal counsel memoranda to caseworkers in one planning and service area involving the heightened scrutiny of authorities under powers of attorney created on or after Oct. 1, 2011, for creation of qualified income trusts and personal care contracts.

The Medicaid Committee will continue to discuss these important matters as they develop. If you would like to be a part of developments as soon as they occur, you may join the Medicaid Committee by emailing Arlee Coleman, administrator for the Elder Law Section, at *acolman@flabar.org*.

Unlicensed Practice of Law Special Committee

John R. Frazier, chair

The Elder Law Section Unlicensed Practice of Law Special Committee has five committee members. The committee holds a monthly teleconference on the third Tuesday of every month at 4 p.m. Our committee is considering how to increase public awareness of the UPL problem in Florida. We are trying to determine whether a proposal regarding UPL should be submitted to The Florida Bar Board of Governors or to The Florida Bar Standing Committee for UPL. Our committee has also prepared an article for *The Elder Law Advocate*, which addresses attorneys who provide legal services for the clients of non-attorney Medicaid planners. The UPL Committee will continue to write publications to increase awareness of the UPL problem in Florida, and the committee will continue to encourage and facilitate the filing of UPL complaints with The Florida Bar.

Are you assisting in the unlicensed practice of law?

What Florida attorneys need to know about working with non-attorney Medicaid planners

Submitted by Unlicensed Practice of Law Special Committee
John R. Frazier, chair

In recent years, there have been increased reports of non-attorney Medicaid planners providing services that are similar to the services provided by elder law attorneys, assisting members of the public to obtain Medicaid benefits in nursing homes and assisted living facilities. There have also been increased reports of Florida attorneys providing legal documents such as qualified income trusts and personal service contracts for the clients of these non-attorney Medicaid planners. The purpose of this article is to outline the UPL rules Florida elder law attorneys need to know.

On May 13, 2009, The Florida Bar Standing Committee on the Unlicensed Practice of Law issued a letter outlining some of the circumstances under which the activities of non-attorney Medicaid planners would constitute UPL. In describing the activities that would constitute UPL, the standing committee outlined in its letter that UPL includes the hiring of "an attorney to review, prepare, or modify documents for customers if payment to the attorney was through the company" ("company" refers to the non-attorney Medicaid planning company). Accordingly, if an attorney were to perform Medicaid planning legal services for a client, and the payment of the attorney's fee was made to the attorney through the Medicaid planning company, such activity would constitute the unlicensed practice of law, and subject the attorney to possible discipline by The Florida Bar.

The Rules Regulating The Florida Bar are also clear on this issue. Florida Bar Rule 4.5.4 (a) states:

(a) **Sharing Fees with Non lawyers**. A lawyer or law

continued, next page

firm shall not share legal fees with a non-lawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to 1 or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, in accordance with the provisions of rule 4-1.17 pay to the estate or other legally authorized representative of that lawyer the agreed upon purchase price;

(4) bonuses may be paid to non-lawyer employees for work performed, and may be based on their extraordinary efforts on a particular case or over a specified time period. Bonus payments shall not be based on cases or clients brought to the lawyer or law firm by the actions of a non-lawyer. A lawyer shall not provide a bonus payment that is calculated as a percentage of legal fees received by the lawyer or law firm; and

(5) A lawyer may share court-awarded fees with a nonprofit, pro bono legal services organization that employed, retained, or recommended employment of the lawyer in the matter.

In addition, Florida Bar Rule 4-5.4 (c) states:

Partnership with Non Lawyer. A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

And then Florida Bar Rule 4-5.5 (a) states:

Practice of Law. A lawyer shall not practice law in a jurisdiction other that the lawyer's home state, in violation of the regulation of the legal profession in that jurisdiction on or in violation of the regulation of the legal regulation of the legal profess in the lawyer's home state **or assist another in doing so**" (emphasis added).

In the comments to Rule 4-5-5 (a), The Florida Bar Rules state:

Subsection (a) applies to unlicensed practice of law by a lawyer, whether through the lawyer's direct action or **by the lawyer assisting another person** (emphasis added).

Accordingly, the May 13, 2009, letter published by The Florida Bar Standing Committee on the Unlicensed Practice Law and the Rules Regulating The Florida Bar indicate there is substantial risk that an attorney could violate Florida Bar rules in three significant ways by affiliating with non-attorney Medicaid planners. A Florida Bar rule would be violated if an attorney:

(1) Receives a payment directly from a non-attorney Medicaid planner for services provided to a client;

(2) Assists a non-attorney Medicaid planner in the unlicensed practice of law; or

(3) Forms a partnership with a non-attorney Medicaid planner.

Conclusion

For an attorney who chooses to affiliate with a non-attorney Medicaid planner, there are clear potential risks that a Florida Bar rule could be violated. In addition to the risk of violating a Bar rule, there are other potential consequences associated with affiliating with non-attorney Medicaid planners. In recent years, there have been numerous allegations that some non-attorney Medicaid planners are indeed engaging in UPL activity, therefore creating a risk of harm to the public. By affiliating with non-attorney Medicaid planners who may be engaging in UPL, an attorney may be indirectly supporting UPL activities that present a risk to the public. Finally, the non-attorney Medicaid planners that are providing Medicaid planning services across the state of Florida are indeed your competitors, whether or not those non-attorney Medicaid planners are engaging in UPL. By affiliating with non-attorney Medicaid planners, and providing legal services for the clients of non-attorney Medicaid planners, you are also indirectly supporting the unlicensed, unregulated and uninsured competitors of your own law practice.

Call for papers – *Florida Bar Journal*

Enrique Zamora is the contact person for publications for the Executive Council of the Elder Law Section. Please email Enrique at *ezamora@zhlaw.net* for information on submitting elder law articles to The Florida Bar Journal for 2012. 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.

Florida Joint Public Policy Task Force for the Elderly and Disabled

A partnership of

The Academy of Florida Elder Law Attorneys & **The Elder Law Section of The Florida Bar**

Thank You, Contributors!

These attorneys and firms financially support the Florida Joint Public Policy Task Force for the Elderly and Disabled.

The task force and your peers need **your** support to further the task force's accomplishments on ***all*** our behalf and for the future of our practices.

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Protecting diminished capacity clients through rules that give attorneys ethical guidance

A proposal to amend the Florida Rules of Professional Conduct

by Roberta K. Flowers, on behalf of the Ethics Committee

Ethically working with diminished capacity clients is one of the thorniest issues elder law attorneys face. Attorneys want to serve and protect these clients while at the same time remaining within the confines of the ethics rules. It has become clear, however, that the Florida Rules of Professional Conduct do not give clear guidance for the attorney who is working with these types of clients. Ambiguity and conflicts between the various applicable rules have made it evident to the members of the Ethics Committee of the Elder Law Section that the rules should be amended to clarify the attorney's obligations, and options, when representing a client with diminished capacity. Therefore, the Ethics Committee of the Elder Law Section is working on a proposal to modify Rule 4-1.14 of the Rules Governing Florida Lawyers (the Florida Rules) to give Florida lawyers more guidance in dealing with diminished capacity clients. The committee will be asking the Elder Law Section to recommend to the Board of Governors that Florida Rule 4-1.14 be modified to more closely follow the ABA Model Rule 1.14. This rule is proposed to be modified in three important ways. First, the proposal will suggest the rule should require that the attorney not take protective action on behalf of the client without first determining the client has diminished capacity. Second, the Ethics Committee is suggesting the rule should make it clear that Florida lawyers can reveal confidential information in order to take protective action. Finally, the proposal will ask that Florida Rule 4-1.14 include some of the helpful comments from the Model Rules that give guidance on how to evaluate the client's capacity and when to take protective action.

By way of historical background, the Florida Rules are significantly like the Model Rules in many aspects. The Model Rules, including Rule 1.14, underwent a significant revision called the Ethics 2000 project. In 2004, the BOG recommended that many of those revisions be adopted by the Florida Supreme Court. However, it elected not to recommend the adoption of the amendments to Rule 4-1.14 because it believed the proposed amendments needed to be further studied. The Ethics Committee believes now is the time to renew those efforts to adopt the Model Rule and urges the members of the Elder Law Section to support efforts to adopt these changes.

Florida Rule 4-1.14 needs to reflect that protective action should be taken only after the attorney determines the client has diminished capacity and is in danger of substantial injury. The Ethics Committee suggests the current rule is much too paternalistic and does not take into account the important protections of individual rights. The current Florida Rule states:

> A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.[1]

The Model Rule, on the other hand, suggests an attorney should not seek protective action unless, "the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest."[2] The Model Rule goes on to suggest that seeking a guardianship is only one of several protective actions that can be taken. It states "the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."[3] The Model Rule also makes it clear the attorney should not be quickly arriving at the decision to take protective action merely because he or she does not agree with the client's decisions about what is in the client's best interests. Competent clients can sometimes make decisions that are not in their best interests, and that, in and of itself, does not mean the attorney should consult other people about the client or take other protective actions. Clients of all ages have the right to be "stupid," and no attorney should take away that right without first determining the client has diminished capacity. The Florida Rule gives too little protection to clients and not enough guidance to attorneys.

Additionally, Florida Rule 4-1.14 should adopt the language from Model Rule 1.14 (c), which states:

> Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.[4]

The Florida Rule has no similar language, and this language would give the Florida lawyer clear guidance about the propriety of revealing confidential information when seeking protective action. Additionally,

continued, next page

Diminished capacity clients
from preceding page

this revision would tell the attorney that if he or she is seeking protective action, from the least restrictive (perhaps talking to family) to the most restrictive (seeking a guardianship), he or she can reveal information in order to protect the diminished capacity client. By giving this protection to the attorney, the attorney is more effective in seeking protective action and will not hesitate in fear of an ethical violation.

Finally, the Ethics Committee believes that several of the comment sections in the Model Rules would be helpful additions to the Florida Rule. Particularly Comments 5, 6 and 8 should be considered by the section and proposed to The Florida Bar. Comment 5 states:

> [5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.[5]

This comment gives helpful guidance as to the different kinds of protective actions that might be taken. Further, it also confirms that the least restrictive means should be employed. Finally, it gives the attorney some ethical considerations when determining what kinds of protective actions should be undertaken. This comment clearly balances the need for protective action with the need to protect individual autonomy. It is the right balance that should guide Florida lawyers in making these difficult decisions. This guidance is lacking in the current Florida Rules.

Comment 6 assists the attorney by delineating how to determine if a client has diminished capacity, and the extent of such diminishment. It sets out the functional approach attorneys should take in making this assessment. It states:

> [6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.[6]

This comment clearly gives the attorney the guidance that the determination of capacity is based on the client's abilities and functions, not on a diagnosis. The attorney's responsibility is within the capabilities of a trained legal professional and does not require a medical degree. This comment does provide for the option to consult with a diagnostician, language that is also contained in the current Florida Rule. The Florida language is, however, as discussed previously, without the specific exception to confidentiality Rule 1.6 and is therefore currently in conflict with those provisions.

Finally, the proposal for amendments should include the addition of Comment 8 of the Model Rules. This is to further clarify the conflict with Rule 1.6. Comment 8 explains further Rule 1.14(c). It states:

> [8] Disclosure of the client's diminished capacity could

adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.[7]

This comment gives the lawyer several things to consider before divulging confidential information. It allows for the revealing of the confidential information, but it also cautions the attorney to evaluate the dangers of revealing that information. It is a good addition to the Florida Rules because it helps clarify the use of confidential information.

So, what is next? The Ethics Committee will be preparing a comprehensive paper on the proposal. The committee welcomes any comments the section's members have about these proposals as it moves forward with this project. Please send your comments to Steven Hitchcock, committee chair, at *steve@specialneedslawyers.com*.

***Roberta K. Flowers, Esq.**, is a professor of law at Stetson University College of Law. Within the Elder Law LL.M. program, Professor Flowers teaches the course Ethics in an Elder Law Practice. She has served on numerous committees of The Florida Bar, including the Professional Ethics Committee, the Evidence Committee and the Standing Committee on Professionalism. She is chair of the Professionalism subcommittee of the Litigation Section's Ethics and Professionalism Committee of the American Bar Association.*

Endnotes:

1 Rules Governing Florida Lawyers Rule 4-1.14 (2004).

2 American Bar Association Model Rules of Professional Conduct, Rule 1.14(b) (2009).

3 Id.

4 American Bar Association Model Rules of Professional Conduct, Rule 1.14(c) (2009).

5 American Bar Association Model Rules of Professional Conduct, Rule 1.14 cmt 5 (2009).

6 American Bar Association Model Rules of Professional Conduct, Rule 1.14 cmt 6 (2009).

7 American Bar Association Model Rules of Professional Conduct, Rule 1.14 cmt 8(2009).

Florida's new Power of Attorney Act brings many changes

by Brandon Arkin

Florida's new Power of Attorney Act contained in F.S. 709 went into effect Oct. 1, 2011. The new statute will affect how we draft, use and enforce powers of attorney (POA). While the changes are too numerous to cover fully in this article, I will address several of the key changes.

No springing or contingent POA: The prior law allowed attorneys to draft a POA that did not take effect until a triggering event occurred, such as a determination that the principal was incapacitated and could not manage property. The new statute no longer allows for springing or contingent POAs. All POAs are effective once properly executed. POAs created on or before Sept. 30, 2011, that contain a springing provision are unaffected by the new statute. There is an exception allowing for military POAs to be made contingent on deployment.

Execution requirements: Durable and nondurable POAs must be signed by the principal and by two subscribing witnesses, and be acknowledged by the principal before a notary public. A POA is not automatically durable. The POA must have express language stating it is a durable POA and is not terminated by subsequent incapacity of the principal, except as provided in Chapter 709.This excludes military POAs executed in accordance with 10 U.S.C. § 1004(b). Unless stated otherwise in the POA, a photocopy or electronically transmitted copy of an original POA has the same effect as the original. An out-of-state POA is considered properly executed if it complies with the execution requirements for the state where it was executed. Note: If the out-of-state POA provides a power not allowed in Florida, that power will not be given effect, even though the POA was properly executed.

Revocation: The principal can revoke a POA either by express revocation in a new POA or in a writing signed by the principal. There is no requirement that a standalone revocation be witnessed or notarized. Simply making a new POA is not enough by itself to revoke a prior POA. The new POA must expressly state all other POAs are revoked.

Knowledge: This is defined as when a person has actual knowledge of the fact, has received a notice or notification of the fact or has reason to know the fact from all other facts and circumstances known to the person at the time in question.

Notice: A notice of revocation, partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the power of attorney, death of the principal, suspension by initiation of proceedings to determine incapacity or to appoint a guardian, or other notice, is not effective until written notice is provided to the agent or any third persons relying upon a power of attorney.

Notice must be in writing and must be accomplished in a manner reasonably and likely to result in receipt of the notice. Permissible methods of notice include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business or a properly directed facsimile or other electronic message. Notice to a financial institution must contain the name, address and the last four digits of the principal's taxpayer identification number and be directed to an officer or a manager of the financial institution in this state. Visit this website to find the official address for all national banks (state banks are not included): *www.ffiec.gov/nicpubweb/nicweb/SearchForm.aspx.*

Notice is effective when given, except that notice upon a financial institution, brokerage company or title insurance company is not effective until five days, excluding Saturdays, Sundays and legal holidays, after it is received.

Agent: Only a natural person, 18 or older, and certain financial institutions may be named agents. The statute allows single agents, co-agents and successor agents. Unless otherwise stated in the POA, co-agents can exercise their authority independently. Even if the POA requires two or more agents to act jointly, there is an exception for banking transactions that allow any one agent to sign checks and handle banking matters with a single signature. The agent can accept or reject the power thrust upon him or her by the POA. The agent can accept all or part of the authority granted under the POA. If no provision regarding compensation exists in the POA, the statute states the agent is entitled to reimbursement of reasonable expenses incurred on behalf of the principal. However, a qualified agent is entitled to reasonable compensation. A qualified agent can be an attorney or a CPA licensed in Florida, the principal's spouse, relatives of either the principal or the spouse, or certain financial institutions with trust powers and a place of business in Florida. There can be no professional agents. An agent is not allowed to have served more then three principals at the same time.

Duties of the agent: There are mandatory and default duties for the agent. Mandatory duties apply in spite of a contrary provision. Default duties apply in the absence of a contrary provision and are modifiable.

1. Mandatory duties

a. Not to act in a contrary manner

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to the principal's actual known reasonable expectations

b. Not to act contrary to the principal's best interest

c. To preserve the principal's estate plan

d. To perform personally

e. Keep adequate records

2. Default duties

a. To act with care, competence and diligence

b. To act loyally and avoid conflicts

c. To cooperate with health-care providers

Authority of the agent: An agent may only exercise authority specifically granted to the agent in the POA and any authority reasonably necessary to give effect to that express grant of specific authority. A general provision such as "my agent may do all acts in my place as I could do personally" by itself is insufficient to grant authority to the agent.

No incorporation by reference: Powers of the agent cannot be incorporated by reference; they must be specifically stated in the POA. There are two exceptions to this rule, for banking and investment powers. A POA can state the agent has authority to conduct banking transactions as provided in F.S. 709.2208(1) and authority to conduct investment transactions as provided in F.S. 709.2208(2).

"Superpowers," § 709.2202: The powers that may be granted to the agent under this section include:

1. Create an inter vivos trust
2. Amend, modify, revoke or terminate a trust created by or on behalf of the principal, only if the trust instrument explicitly provides for such action by the settlor's agent
3. Make a gift (This power is limited to the federal gift tax exclusion amount regardless of whether the federal gift tax exclusion applies to the gift. The amount can be doubled if the principal's spouse agrees to consent to a split gift under the Internal Revenue Code section 26 U.S.C. 2513. Spousal split gift consent on behalf of the principal is limited to the annual exclusion amount.)
4. Create or change rights of survivorship
5. Create or change a beneficiary designation
6. Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
7. Disclaim property and powers of appointment

Requirements for the "Superpowers":

1. If the agent is not related to the principal, the agent may not use these powers to benefit himself or herself or anyone for whom the agent has a support obligation.
2. The authority must be specifically stated.
3. The principal must sign or initial next to each specific enumeration of the authority.
4. The agent may only exercise the authority consistent with the duty to preserve the principal's estate plan.
5. The exercise must not be prohibited by any governing document affected.

Acceptance, rejection and liability of third persons: A third person must accept or reject the POA within a reasonable time. For financial institutions, four days is presumed reasonable. A third person may make a good faith request for an English translation or an opinion of counsel as to a matter of law.

A third person rejecting the POA must provide a written explanation stating why the POA was rejected. A third person may require the agent to provide an affidavit stating where the principal is domiciled, that the principal is not deceased and there has been no revocation, partial or complete termination by incapacity or other event referenced in the POA, or suspension by initiation of proceedings to determine the principal's incapacity or to appoint a guardian of the principal.

Third persons are protected from liability if they rely in good faith on a POA that appears to be properly executed, or if they rely in good faith on an English translation, opinion of counsel or affidavit of an agent. Financial institutions that honor an agent's authorized authority to conduct banking or investment transactions are also protected. If a third person improperly rejects a POA, the agent may seek a court order mandating acceptance and liability for damages, including reasonable attorney's fees and costs.

Brandon Arkin *is an associate at the Law Office of Benjamin R. Jacobi PA in Miami. His practice is focused primarily in family law, elder law and civil litigation. Mr. Arkin currently serves on the Executive Council as chair of the Law School Liaison Committee. Any questions or comments on this article can be sent to Mr. Arkin at brandon.arkin@gmail.com.*

Trust protectors: asset or liability?

by Jessica M. Lillesand

In recent years, the term "trust protector" has reared its head increasingly more often in irrevocable trusts, including special needs trusts. In part, this can be attributed to needs the trust protector can often meet in these trusts. These include easing the process of amending the trust to conform to changes in law or circumstance, appointing successor trustees or removing current trustees, acting as an advocate for the beneficiary and policing the trustee's actions. However, the lack of legal precedence dealing with the concept of trust protectors, combined with recent caselaw highlighting their potential fiduciary liability, has some concerned about using the term arbitrarily. Others have warned that the addition of this new animal to the herd could breed a more complicated, and thus expensive, trust administration process.

While no accepted meaning of a trust protector exists, one can discern some similar characteristics in any incarnation of the term. The protector is an individual, committee of individuals or an entity who is not the trustee but who holds powers that either narrowly or broadly can affect the trustee's ability to effectuate its own powers. The term is often used interchangeably with that of "trust advisor" or "special trustee," which may, depending on the instrument, be granted similar powers.

Often the powers granted to a protector include the ability to remove a trustee or to appoint a successor trustee when the document fails otherwise to provide for one, the power to change the situs of the trust or the power to amend to correct scrivener's errors and to comply with tax or other law. In these incarnations, the trust protector often assumes a "springing" role, which is invoked at a specific time or event rather than assuming a more general supervisory role. The person invoking the protector could be the trust protector him or herself, the trustee or even the beneficiary.

More expansive uses of the trust protector have included the power to review and approve accountings and investments, as well as to veto or direct investment decisions of the trustee. Especially in cases where the trust protector has an ongoing duty to monitor the actions of the trustee, the managerial nature of these powers are likely to be counterintuitive for those wishing to use the role of protector to cut down on administrative costs. However, it may be attractive to those who are interested in using the role as an intermediary to protect the interests of the beneficiary from the otherwise unrestrained discretion of the trustee.

> . . . the protector is often functioning in a fiduciary capacity and must therefore act with the applicable duty of loyalty, diligence, good faith and impartiality required by the trust code.

Whether the trust protector assumes a role of a fiduciary will depend to a large extent upon the power that was granted as well as upon who is acting in the role of protector. At times, the beneficiary him or herself could be granted a protector's power, and thus such a power would be considered as held in a personal rather than a fiduciary capacity. However, particular care should be taken when doing so, since the granting of particular powers, such as the power to amend the trust, direct funds or terminate the trust, among others, may cause the trust to be viewed as an available asset and cause a special needs trust beneficiary to lose access to critical public benefits. This may also have important tax consequences if the trust protector is able to exercise a personal power without restrictions for his or her own benefit.

> . . . the managerial nature of these powers are likely to be counterintuitive for those wishing to use the role of protector to cut down on administrative costs.

In most instruments, especially with special needs trusts, the beneficiary will not be the person named to the role of trust protector. Thus, the protector is often functioning in a fiduciary capacity and must therefore act with the applicable duty of loyalty, diligence, good faith and impartiality required by the trust code. This fiduciary role has come under some scrutiny recently, as states have scrambled to identify the protector's role and duties. Some states, such as Arizona and Alaska, have specifically proclaimed that the protector does not hold its powers in a fiduciary capacity (*see* A.R.S. §14-10818 and A.S. §13.36.370(d)) while others, like Nevada and New Hampshire, have indicated the opposite. Florida has adopted a version of the Uniform Trust Code (UTC), which recognizes the trust protector concept, and comments to §808 of the UTC indicate the protector's role is often more expansive than that of a "trust advisor" and highlight the fiduciary capacity assumed with a power to direct.

The extent of the fiduciary duty, and to whom it is owed, is often the more difficult question than whether such a duty exists. Obviously, the more expansive the power, and the more burden on the protector to oversee the actions of the trustee or to initiate action on his or her own, the more liability the trust

continued, next page

Trust protectors
from preceding page

protector will assume. Depending on the breadth of powers granted, the protector may owe a similar duty to the beneficiaries as the trustee itself owes. Others have raised the issue of whether that duty also extends to the grantor of the trust, or even, as the recent Missouri case *McLean v. Davis,* 283 S.W. 3d 786 (Mo. App. S.D. 2009) seemed to indicate, to the trust itself.

Trust protectors offer a gamut of exciting possibilities for trust drafters, but their use also portends a future of potential litigation over the extent and nature of the protector's liability. Certainly, their use may make trust administration easier, quicker and cheaper, or may ease the concerns of grantors, beneficiaries and courts as to the unfettered discretion of trustees. To avoid potential effectuation problems, however, the trust drafter should take care to limit and define specifically the powers granted and the capacity with which those powers should be exercised and to delineate who may invoke the power.

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The IRS is a creditor in your estate? Be afraid, be *very* afraid!

The tale

Sally was the personal representative of her mom's estate. She knew her mom owed some taxes to the IRS from the prior year but did not have any specific information regarding the issue. On the advice of her attorney, she sent the local Internal Revenue Office a notice to creditors. After the three-month waiting period, she had heard nothing from the IRS. She paid the other creditors and moved into her mother's homestead, which had been transferred to her name by an order designating homestead status of real property. Later that year, Sally received a letter from the IRS stating that her mother still owed $10,000. She ignored it because the IRS had not filed a claim within the three-month period set out by F.S. 733. 702. The next year she was shocked to learn the IRS had placed a lien on her home. She calls you to ask if the IRS can do that. Your answer is …

The tip

Yes, it can! First, under 31 USC § 3713(b), the representative of an estate is *personally liable* for any of the decedent's unpaid taxes to the extent the PR paid creditors prior to paying the tax liability (that should get the attention of your PR). Second, 733.702 does not apply to the IRS. And third,

Tips & Tales

Kara Evans

Florida homestead protections do not protect you from the IRS's collection efforts (*United States v. Estes,* 450 F.2d 62, 65 (5th Cir. 1971), which states a "homestead exemption does not erect a barrier around a taxpayer's home sturdy enough to keep out the Commissioner of Internal Revenue").

So, how do you advise a personal representative when the IRS is or may be a creditor in an estate?

Get an EIN: An EIN is a nine-digit number assigned to estates and other entities for tax filing and reporting purposes. The Social Security number of the decedent will be linked to the EIN number for the estate. This will give the IRS an opportunity to send you, the personal representative, the information you need to properly manage the estate.

File a Form 56 Notice Concerning Fiduciary Relationship: This form alerts the IRS to the fact that you are acting on behalf of the decedent and the estate. The IRS will then have an address to send IRS notices and correspondence. This will help alert you to any issues the decedent had with the IRS.

Notice: While the notice procedures under the Florida Statutes will not suffice to serve the IRS, Title 28 U.S.C. § 2410(b) does set out the proper procedures. It requires that a copy of the complaint (in this case the notice to creditors) be served upon the United States attorney for the district in which the action is brought and that copies of the process and complaint be sent, by registered mail, or by certified mail, to the attorney general of the United States at Washington, D.C. The United States may appear and answer, plead or demur within 60 days after such service or such further time as the court may allow.

Tax tips for elder lawyers

Estate tax portability election: Some trips and traps

All elder law practitioners should now know of the 2010 Tax Relief Act's estate tax portability election. This election allows the surviving spouse to use the unused portion of the first to die's $5 million estate tax exemption. While this seems both simple and very beneficial at first, in many cases it is not as valuable or as simple as it seems. It also has some traps—some of which are dependent on what happens with the estate tax law after 2012 (remember, without a law change, the exemption amount becomes $1 million after 2012).

1. The portability election only applies to decedents who die in 2011 and 2012. If the surviving spouse does not die or use the first spouse to die's ported exclusion amount before the end of 2012, the porting appears to be lost without a law change. If the second spouse dies in 2013 or later, will the ported amount still be usable? If it was used by the surviving spouse for lifetime gifts, will it be recaptured? Again, it is not clear at this point.
2. Remember that the porting only applies to estate and gift taxes, not to the generation skipping tax. Therefore, GST trusts may still be needed.
3. If the first spouse to die is a non-citizen/nonresident, portability does not apply.
4. If the surviving spouse remarries and survives the new spouse, the first spouse's unused ported exemption is lost. If a shelter trust is used instead, the first spouse's exemption (to the extent used in the shelter trust) would still have been used. The surviving spouse needs to be realistic as to the possibility of remarriage.
5. A timely filed estate tax return (with all attachments and schedules) (Form 706) is needed to make the election. It is a full return, even if the 706 is not otherwise needed (See IRS Notice 2011-82). Preparation of a proper 706 is not easy. Remember that if you are the preparer of the Form 706, you have an obligation to prepare the return properly, even if it is only being filed for the portability election.
6. It is possible, if a Form 706 is filed, to elect out of portability.
7. Little spoken about, the portability election extends the statute of limitations on the first to die's estate tax return. Therefore, even if the IRC §6105 limitation period is over, the IRS may still review the first to die's estate tax return and also adjust the ported amount. Therefore, if the first to die used various valuation discounts and other advanced estate tax planning techniques, by opting out, the statute of limitations clock on the first estate is not extended.
8. Remember that not all states use the $5 million exemption amount. Be sure to take into account other state(s) law in deciding whether or not to elect.
9. If the surviving spouse has a significant estate valuation and either will likely die by the end of 2012 or plans to make significant gifts in 2011 or 2012, the election is probably worthwhile.
10. Whatever you do—document. What happens if you are settling a small estate, do not file the estate tax return and the next year the surviving spouse finds the next Microsoft start-up, wins the megaball or is the unexpected beneficiary of a wealthy relative? How do you explain to the surviving spouse the "wasting" of the remaining millions of exemption amount? And that will be the client who, prior to the windfall, did not want to spend money on legal fees.

Michael A. Lampert

Identity theft and the IRS

There has been an explosion of IRS identity theft—from 52,000 for all of 2008 to 987,000 for Jan. 1 through May 5, 2011. The "theft" includes activities such as filing false returns using someone else's Social Security number and providing someone else's Social Security number to employers, casinos and other payers who report the payment to the IRS.

The result? As I have already seen in my own practice, a false return results in significant delays of the "real" taxpayer's refund. Sometimes the IRS tries to assess and ultimately to collect tax on "income" the real taxpayer never earned or received. In some cases the IRS has filed a federal tax lien and even levied on the real taxpayer's income and assets, creating tremendous hardship. For an elder client, relying on a small pension, Social Security and a little savings, the result can be devastating.

The IRS has created an identity theft unit called the Identity Protection Specialized Unit. Its phone number is 800/908-4490. The IRS even has an email mailbox to forward suspicious emails, *phishing@irs.gov*. The IRS is also attempting to lock Social Security numbers of deceased taxpayers. The IRS can issue a special *one time* password for tax returns to victims of identity theft. It must be stressed that the IRS means *one time*; if the taxpayer loses the password, it is not reset or given again.

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Tax tips for elder lawyers
from preceding page

If identity theft is causing economic harm, immediate threat of adverse action or irreparable injury or harm, the assistance of the IRS Taxpayer Advocate's office can be requested. Try only to send cases to the Taxpayer Advocate's office where there is a real, immediate harm to the client rather than, for example, a delayed refund that should be handled by the Identity Protection Specialist Unit. Why? As an example, one South Florida Taxpayer Advocate's office receives 15 to 20 identity theft cases *per day*, with only 20 staff. This has resulted in an increased caseload of 40 to 50 cases per staff member to 100 to 110.

There are many reasons for the increase in identity theft, but it is believed that much of the increase is due to electronic filing of returns. With the increased emphasis on e-filing and the requirement that most tax preparers e-file their clients' returns, expect to see the problem continue. I have a case where a client's now former accountant e-filed a client's draft income tax return without the client's written permission. The IRS is already trying to collect the tax due, and we had to file a collections appeal even though the taxpayer subsequently filed a timely income tax return showing no tax due.

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

Summary of selected caselaw

by Diane Zuckerman

Attorney's fees

William E. Clark, Appellant, v. The Estate of Johnie Vaden Elrod and H. Vernon Davids, Appellees, 61 So. 3d. 416 (2nd DCA 2011)

This case involves attorney's fees for legal services provided by H. Vernon Davids to William E. Clark. The court referred to legal services provided from September 1999 to November 2000 as (Stint I), and services provided from May 2001 to January 2002 as (Stint II). Attorney Davids filed a charging lien against Clark, and the trial court entered a final judgment enforcing the charging lien and awarding Davids $57,921.76 in attorney's fees.

In September 1999, Clark and Davids entered into a written fee agreement in a probate matter in which Clark agreed to pay Davids $130 an hour plus 16 percent of any gross recovery from the estate distribution. The agreement contained a clause providing that if either ended the attorney-client relationship, the 16-percent provision would be voided and Clark would owe an additional $70 per hour, which was the difference between David's normal hourly rate of $200 and the amount charged per the agreement. In essence the $70 per hour was an early termination fee. In November 2000, Davids withdrew from representation, citing irreconcilable differences. However, at that time, Davids did not invoice Clark for the additional $70 per hour fee.

In May 2001, Clark retained Davids again, requesting he serve as local counsel. They entered a verbal agreement providing that Clark would pay $130 per hour and 10 percent of the estate proceeds. The agreement was confirmed in writing by Clark but was not signed by Davids, and thus the court considered it to be a verbal agreement. In January 2002, Davids withdrew as counsel, again citing irreconcilable differences. Clarks paid the invoice for services rendered during Stint II for $130 an hour.

In 2005, Davids learned that Clark had received a large distribution for the original probate action. He filed a charging lien on May 23, 2005, claiming Clark owed him attorney's fees for Stint II totaling 10 percent of the net estate distributions that Clark had received after Davids withdrew as Clark's counsel. Davids then filed an amended motion reasserting his claim to fees under Stint II and for the first time asserting fees of $70 per hour owed under Stint I, plus interest. The trial court determined that the statute of limitations did not bar Davids' claim for fees under Stint I because the claim was tolled until the filing of the amended motion. As for Stint II, the court found the verbal agreement did not constitute a valid and enforceable agreement, but held that under the *quantum meruit* theory, Davids was entitled to a rate of $300 per hour.

The 2nd DCA addressed the issues of Stint I and Stint II separately. As to Stint I, the court noted that the statute of limitations on an action for breach of contract was five years. Notably the court found that the cause on action accrues or begins at the time of the breach. The court found that the trial court incorrectly found the date of accrual was when Davids ended the attorney-client relationship in November 2000, rather than June 2008, when the amended motion for charging lien was filed. Therefore, the court held that the statute of limitations barred the claim for attorney's fees under Stint I.

As to the trial court's ruling as to Stint II, the ruling was affirmed.

The take home lesson in this case is that an action for breach of contract with respect to attorney's fees will begin to accrue at the time of the breach, and any action arising out of the contract must be filed within the statute of limitations period. The other lesson here is to assure that your representation agreement is valid. If, however, the court finds it is not, one can plead alternatively under the doctrine of *quantum meruit*.

Jurisdiction

Henderson and Stardale, LLC, Appellants, v. Vanessa Elias, Appellee, 56 So. 3d 86 (4th DCA 2011)

Appellant Dale Henderson and the decedent William Elias formed Stardale, a Delaware limited liability company, and entered into an operating agreement, which provided that Stardale would dissolve upon Elias's death. When Elias died in 2008, Henderson, the remaining partner, failed to dissolve the company. A lawsuit against Stardale and Henderson was filed in New York, alleging breach of the operating agreement. The complaint alleged the decedent had made several loans to the company to purchase, remodel and maintain two properties in New York. The estate alleged that Henderson had failed to repay the loans and liquidate the assets per the agreement.

During the pendency of the litigation, the personal representative of the Estate of William Elias filed an amended petition for a temporary injunction in the probate court in Florida, alleging jurisdiction over Stardale pursuant to the "inherent jurisdiction to monitor the administration of an estate, including the authority to issue injunctions freezing assets" belonging to the estate. The petitioner served the registered agent for Stardale with a copy of the petition. Stardale answered by alleging the petition did not contain sufficient allegations to establish personal jurisdiction. The probate court found there was personal jurisdiction over Stardale.

The 4th DCA, citing *Venetian Salami Co. v. Parthenais*, 554 So. 2d. 499 (Fla. 1989), stated that a determination of whether a Florida court may exercise personal jurisdiction over a non-resident requires a two-step analysis. First, it must be determined if the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of Florida's long arm statute, Section 48.193. If so, the next step is to determine whether there are sufficient minimum contacts to satisfy due process requirements.

The 4th DCA found the amended petition lacked the allegations that Stardale committed any act or omission directed to Florida, and that it was insufficient to state a basis for jurisdiction over Stardale. The court held that because the allegations in the petition were insufficient, the probate court should have dismissed it without prejudice to amend. The case was reversed and remanded for further proceedings.

The take home message here is that when attempting to obtain jurisdiction over an out-of-state entity, the pleadings should allege specific facts, if they exist, showing minimum contacts with Florida that would subject the party to jurisdiction under F.S. 48.193. (i.e., alter ego of a resident party or a principal-agent relationship).

Testamentary capacity

Gail Levin, Appellant, v. William Levin, individually, and as Trustee of the Shirley Sunshine Levin Declaration of Trust Agreement Dated May 22, 2008, Jessica Lynn Levin and Benjamin Levin, Appellees, Nos. 4D09-4291 and 4D09-4293 (4th DCA, May 2011)

The decedent, Shirley Sunshine Levin, had two children: Gail and William. In 1987, Shirley executed a will in which she divided her estate equally between the two. She executed a new will and trust on May 22, 2008, in which she devised specific sums:$100,000 to William's daughter Jessica, $50,000 to William's son Benjamin, $350,000 to Gail and the remainder to William. The estate was valued at about $3 million at the time of Shirley's death on Aug. 16, 2008. William was nominated as personal representative and trustee, and the May 2008 will was admitted to probate. Gail filed an objection to the petition for administration and a counter petition for administration. At trial she asserted that the 2008 will was a product of undue influence and that her mother lacked testamentary capacity. The trial court denied a motion for continuance and prohibited her from calling an expert witness to testify on the capacity issue. The probate court determined that William had not executed undue influence of the will and trust and that Shirley had testamentary capacity.

Regarding the issue of undue influence, the court noted that the individual contesting the will has the burden of proving that the alleged influencer is 1) a substantial beneficiary under the will; 2) occupied a confidential relationship with the testator; and 3) was active in procuring the will or trust, citing *In re Estate of Carpenter*, 253 So. 2d. 697, (Fla. 1971). The probate court found there was no evidence of active procurement. In upholding the probate's finding, the 4th DCA indicated the probate court had not abused its discretion on the undue influence finding.

As to the issue of testamentary capacity, Gail argued the 2008 trust and will were based on an "insane delusion." At the will and trust signing, the testator told William and the attorney that she had not seen Gail for 10 or 11 years. At trial, however, there was evidence showing Gail and her mother had seen each other several times before the 2008 signing. The probate court had not addressed whether the evidence showed or failed to show that the mother suffered from an "insane delusion" as to her visiting history with her daughter.

The 4th DCA cited *Miami Rescue Mission, Inc. v. Roberts*, 943 So. 2d 274 (Fla. 3d DCA 2006), for the proposition that "where there is an insane delusion in regard to one who is the object of the testator's bounty, which causes him to make a will he would not have made but for that

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delusion, the will cannot be sustained."

The probate court's ruling on testamentary capacity was reversed and remanded to decide the issue of whether the testator suffered from an insane delusion at the time she executed the will and trust that caused her to make a will that she would not have made absent the delusion.

Abatement/consolidation

Robert Reed Relinger, as Personal Representative of the Estate of Robert Fox, Petitioner v. Beverly A. Fox, Russell A. Fox and Citigroup Global Markets, Inc, Respondents, 55 So. 3rd 638 (2nd DCA, 2011)

In this case, the petitioner Relinger opened a probate and filed the decedent's 1984 will. The respondents Beverly A. Fox and Russell A. Fox, siblings of the decedent, filed a petition to revoke the will and sought admission of a 2007 pour-over will associated with a 2007 trust agreement. The PR opposed the admission of the 2007 will, alleging it was a product of undue influence.

The PR also filed a complaint in a separate action against the Foxes and Citigroup, which held the trust property, as required under the Trust Code. In that lawsuit, Relinger alleged the 2007 trust was not executed with the formalities of a will, that the testator lacked capacity at the time of signing and that it was procured by undue influence.

The Foxes and Citigroup moved to abate the action until the issues were resolved in the probate court, and the trial court granted the motion. Reilinger appealed.

The Second District reversed the trial court, finding the trial court's ruling departed from the essential requirements of law. The court held that an abatement of an action pending resolution of another requires that the parties be identical. Here the parties were not identical, and therefore the ruling was reversed. Of significance, the court ruled that because the issues were identical, then the procedure of consolidating the cases would have been appropriate.

This case is helpful for the proposition that when there is a probate case and a trust contest, then consolidation is the preferred procedure. The Trust Code requires that a complaint be filed in any trust action, which necessitates two actions. The two actions can be consolidated to avoid duplication of discovery and the possibility of different outcomes in the separate actions.

Waiver of inheritance rights

Andrea S. Steffens, as surviving spouse of decedent, and as Personal Representative of the Estate of Jeffrey E. Steffens, Appellant v. Denise Evans, as parent and natural guardian of S.S. and A.S., minors, Appellee, No. 4D10-2467 (4th DCA, 2011)

Appellant Andrea Steffens was married to the decedent, Jeffrey E. Steffens, when he died on Jan. 9, 2009. Prior to death, the couple had contemplated separating and had executed a post-nuptial agreement whereby both parties waived all rights to each other's property in the event of death or dissolution of marriage.

Andrea filed a petition for administration, and the probate court admitted the will executed on Jan. 4, 2002, in which Andrea was a substantial beneficiary. The decedent's former wife filed a petition to determine beneficiaries under the will, on behalf of the decedent's minor children. The trial court ruled that Andrea had waived her right to inherit under the will.

On appeal, the appellant raised three arguments the probate court erred: 1) ruling Andrea had waived her rights under the will by executing the post-nupital agreement; 2) refusing to allow Andrea to present evidence; and 3) failing to follow the procedures for adversary proceedings. In affirming the probate court, the 4th DCA noted the trial court correctly relied on F.S. Section 732.702(1), which states:

> The rights of a surviving spouse to an elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate or any of those rights, may be waived, wholly or partly, before or after marriage, by a written contract, agreement, or waiver, signed by the waiving party in the presence of two subscribing witnesses. …*Unless the waiver provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse, or a complete property settlement entered into after, or in anticipation of, separation, dissolution of marriage, or divorce, is a waiver of all rights to elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate, by the waiving party in the property of the other and a renunciation by the waiving party of all benefits that would otherwise pass to the waiving party from the other by intestate succession or by the provisions of any will executed before the written contract, agreement, or waiver* (emphasis added).

In examining the post-nuptial agreement at issue, the court noted it used the language of waiving "all rights" several times throughout. Therefore, the probate court's ruling that the inheritance rights were waived was affirmed.

As a practice tip, all clients should be asked whether a post-will agreement waiving inheritance or statutory rights has been executed.

Fair Hearings Reported

by Katrina M. Thomas

Petitioner v. Respondent, Appeal No. 09N-00081 (July 27, 2009).

The petitioner, 64, had been a resident at the respondent nursing facility for nearly two years. The total monthly charges for the stay at the facility were approximately $5,500, and the petitioner was responsible for paying $765 monthly. The remaining balance was paid by Medicaid.

At issue is the respondent's April 27, 2009, issuance of a nursing home transfer and discharge notice to the petitioner. Such notice was issued due to nonpayment of services at the facility after reasonable and appropriate notice to pay.

The respondent provided evidence to show that bills had been mailed monthly by regular mail to the petitioner's daughter, and the daughter admitted she had received such invoices. The facility also made numerous calls to the family and held a meeting with the family to discuss the situation. The petitioner's daughter acknowledged that the funds, which at the time of the hearing totaled $8,789.95, were owed to the facility. She explained, however, that due to the petitioner's ex-husband's unilateral decision to terminate alimony payments following his retirement, the petitioner was no longer able to pay the $765 patient responsibility to the facility. The facility had not received any documentation that the alimony payments had been terminated following its request for the same, and the facility had not received any verification from the Department of Children and Families, the department that determines eligibility for the Institutional Care Program (ICP) Medicaid the petitioner receives, showing a change in the petitioner's responsibility. The daughter explained she was unaware she was required to report the petitioner's income change to DCF.

The Federal Regulations at 42 C.F.R. s. 483.12 provide the transfer and discharge requirements, and such requirements include in subsection (v) that "the resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility." F.S. 400.0255 provides that the facility must establish that the requirements for discharge have been met by clear and convincing evidence.

The controlling authorities addressing the facility's discharge action do not address the party at fault for a bill remaining unpaid. The respondent was found to have provided reasonable and appropriate notice to pay the outstanding amounts, and the respondent's proposed discharge action was thus in accordance with the applicable federal guidelines. Appeal denied.

Petitioner v. Respondent, Appeal No. 09F-05727 (November 16, 2008).

The petitioner is a resident of a nursing home receiving ICP benefits, and her patient responsibility is $1,367. Her husband lives in the community and is known to the respondent as the community spouse. The respondent, using a formula, determines the petitioner's patient responsibility and the community spouse allowance, the latter of which is a diversion of the petitioner's income to the community spouse.

The community spouse's total monthly income was $4,877, and his total expenses equaled $2,039.18. The Florida Integrated Public Policy Manual, passage 2640.0119.03, provides the formula to determine the community spouse's income allowance, which is the total amount that can be allotted to the community spouse from the institutionalized individual. The respondent, through its policy, determined the petitioner's husband would have $0 diverted to him from the petitioner's nursing home patient responsibility amount of $1,367.

The petitioner asserted that given his car, car insurance, and other expenses the department did not include, he would need approximately $500 diverted to him to break even. The respondent argued that it includes expenses related to shelter and utilities to determine any diversion of the patient responsibility.

If the hearing officer determines exceptional circumstances exist that result in significant inadequacy of the allowance to meet the needs of the community spouse, the hearing officer has the ability to adjust the patient responsibility. Here, the hearing officer determined the petitioner's request did not constitute exceptional circumstances, and the respondent's action was affirmed. Appeal denied.

Petitioner v. Respondent, Appeal No. 09F-07708 (December 14, 2009).

At issue is the notice given by the respondent to the petitioner to establish and collect an over-issuance by agency error of $377.48 in Medicaid Program benefits for July 2008, September 2008, February 2009 and March 2009.

An employee of the nursing home applied for ICP Medicaid on the petitioner's behalf and completed the application on June 12, 2008. The respondent approved the petitioner for ICP Medicaid effective May 2008. In August 2009, the petitioner informed the respondent that he was not in the nursing home, and the respondent

continued, next page

determined the petitioner had left the nursing home on June 14, 2008. The case was then sent to Benefit Recovery.

Benefit Recovery determined the respondent had been notified on July 7, 2008, that the petitioner had been discharged from the nursing home on June 14, 2008. An agency error occurred because the respondent did not terminate the ICP Medicaid benefits following such notification. The total amount overpaid by Medicaid on behalf of the petitioner was $377.48.

The petitioner stated he was unaware he was required to report he had moved from the nursing home and believed the nursing home was taking care of those matters on his behalf. He argued he should not be held responsible for the nursing home and the respondent's mistakes.

F.S. 414.41 addresses the recovery of payments made due to mistake and fraud, and provides that in the event an individual has received public assistance to which he or she is not entitled through simple mistake on the part of the department or on the part of the recipient or participant, the department shall take all necessary steps to recover the overpayment. The Florida Administrative Code s. 65A-1.900, Overpayment and Benefit Recovery, provides that overpayments shall be recovered from the participant.

The hearing officer concluded the participant is the petitioner, the overpayment was due to the respondent's error and the petitioner is thus responsible for repayment. Appeal denied.

Petitioner v. Respondent, Appeal No. 09F-07953 and 09F-07954 (February 12, 2010).

The petitioners are 2-year-old twin boys who suffer from developmental delays and who both require assistance with all daily living activities. The petitioners had been receiving personal care (PC) services eight hours per day, Monday through Friday. In October 2009, the home health care agency requested the PC services be continued at the same level for the period of Oct. 27, 2009, through Apr. 24, 2010. The respondent denied all of the requested hours. Following the petitioners' mother's requested reconsideration, the respondent approved a total of 264 hours, a decrease from the 768 hours previously received. The petitioners' mother requested this hearing on Nov. 16, 2009.

KePRO is the Peer Review Organization contracted by AHCA to perform medical reviews for private duty nursing and personal care assistance. The KePRO reviewing physician explained that the PC services are intended to supplement the care provided by the family. The decision to approve or deny PC hours is based on the petitioners' medical needs, the number of family members or caregivers, their work and/or school schedules and medical impairments. The petitioners' family members are healthy and have no known significant impairments. The respondent determined the services being provided by the home health aide could be performed by the family and did not require a medical professional, were not medically necessary and should be terminated.

The petitioners' mother stated the home health aide was needed to watch the children while she ran errands outside of the home. Further, she asserted the home health aide was necessary both to provide care to the child the petitioners' mother was not caring for at the time and in the event of a medical emergency.

The Florida Medicaid Program is authorized by Chapter 409, Florida Statutes, and Chapter 59G, Florida Administrative Code. Those sections provide that Medicaid reimburses for services determined to be medically necessary, and such determination is made by KePRO's licensed physician reviewer. The respondent determined the services that had been provided by the home health aide were not medically necessary and such services could not be in excess of the family's needs or provided for the family's convenience. The respondent's termination of the PC services was found to be correct. Appeal denied.

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