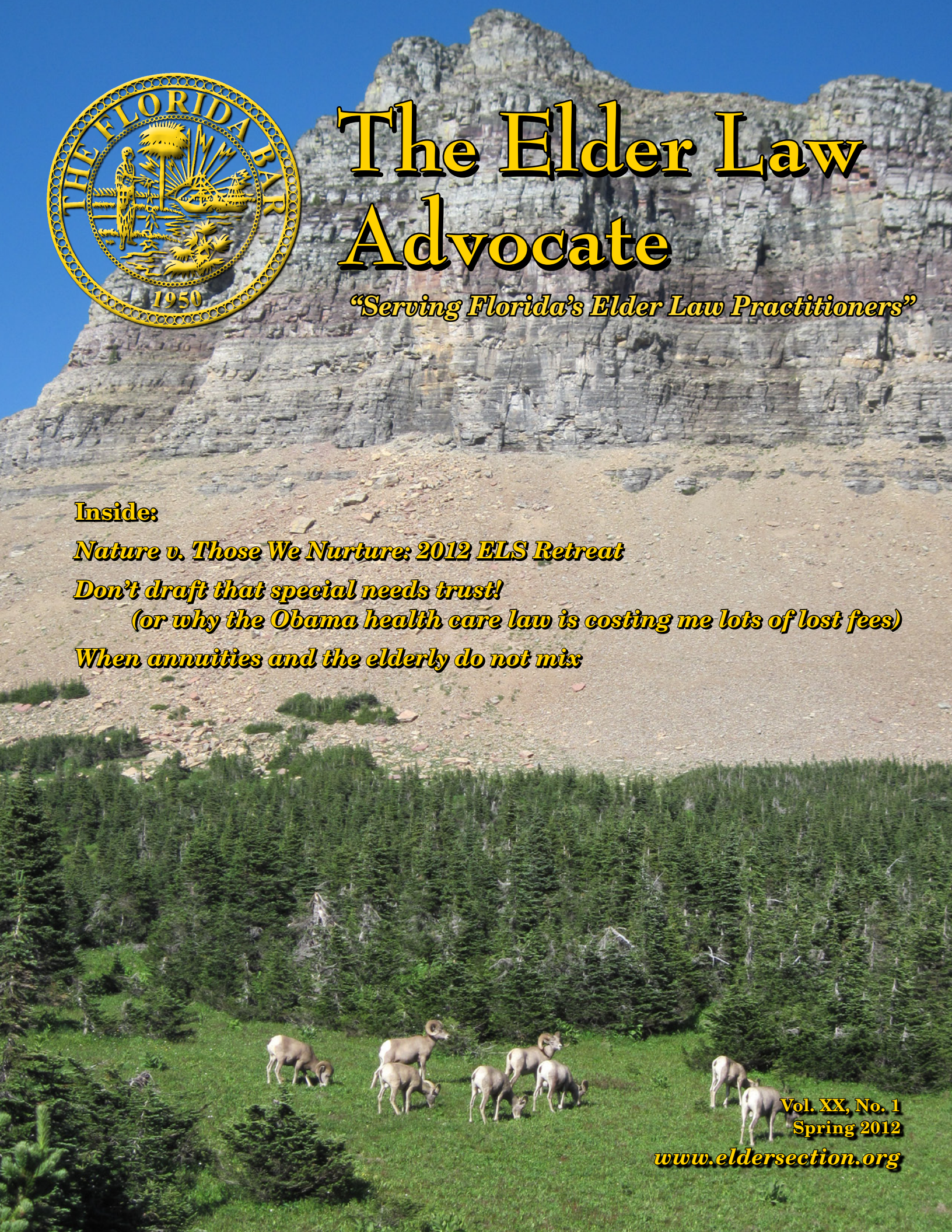

The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Inside:

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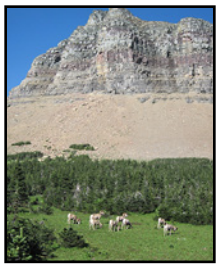
Spring 2012
www.eldersection.org

The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar



COVER ART

Beautiful Glacier Park

Photo by Emma Hemness

Contents:

The deadline for the SUMMER ISSUE is July 2, 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.

Our name change: The continuing saga

During this year as chair of the Elder Law Section, I have found it very useful to refer back to the wisdom of the prior chairs to guide me in overcoming the obstacles I have faced. In fall 2009, Chair Babette B. Bach described the proposed name change of the section from Elder Law Section to Elder & Disability Law Section of The Florida Bar as the section's newest identity crisis. She created the Name Change Committee comprising the most talented and experienced members of this section, including seven past chairs. As the saying goes, the rest is history. The name change was approved last year by the section's Executive Council, and we have been moving toward its implementation. Babette recognized from the very beginning that this was an important change, stating in her fall 2009 "Message from the chair":

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

During our meeting in January of this year, our Executive Council was surprised to learn that notwithstanding the secured approval from other sections that might be impacted by our proposed name change, The Florida Bar, or the "Big Bar" as we affectionately call it, had some concerns that needed to be addressed. I want to revisit some of those questions because I think it is important that our members realize what changes lie ahead for our section. I must confess that I am surprised by the lack of feedback from the general membership regarding this proposed name change. However, I realize that in trying to meet the demands of our daily practices, we sometimes don't have the time to devote to other, perhaps less pressing, though important, issues.

Why a name change? It is clear that many of our members help non-elderly clients who may suffer from either chronic disease and/or incapacity. We help these clients try to maintain their independence, autonomy and dignity. These clients do not consider themselves to be elderly persons and might even feel offended by being grouped together with elderly people.

Are there any expected benefits to the section that will accrue from the name change? It was envisioned that a number of attorneys who practice what may be described as disability law, including Social Security disability law, will be inclined to join our section with the new name. Even though it is very difficult to forecast how many of these attorneys will join the section, it has been estimated that there may be as many as 1,500 Florida attorneys who practice some form of disability law. Obviously, such an increase in membership could potentially double the number of section members and result in additional economic benefits. There will be an increase in revenues, and the new section members will be better able to meet the needs of their clients by giving these new members the legal support and education they need. At the present time, there is no Florida Bar section dedicated to members that practice any form of disability law. There is neither board certification for disability law nor CLE courses offered by The Florida Bar on disability law. It is this section's intent, by changing our name, to offer a home to disability law attorneys so they can join with our other members to improve the practice of elder law in general and disability law in particular. This will benefit disabled persons, whether young or old, who are residents of Florida.

Enrique Zamora

Message from the chair

The Florida Bar asked if a percentage of our general membership approved the name change. The answer is no. The name change was proposed to the Executive Council by David Lillesand, Esq., as chair of the Disability Law Committee. This proposal was based on his experience as chair and his conviction that there was a need to offer a home to disability law attorneys. A majority of the voting members of the Executive Council voted in favor of the change.

Was there any opposition to the name change? The answer is yes. As a matter of fact, I was one of the members who had concerns about the name change proposal, and I was opposed to it. Our most vocal member opposed to the name change is Leonard Mondschein, Esq., our immediate past chair, who prepared an opposition position paper, which is available on the section's website. I happen to believe that elder law includes disability law. As a matter of fact, the National Academy of Elder Law Attorneys (NAELA) states that elder law was developed in the past 20 years as "a separate specialty area because of the unique and complex issues faced by older persons and persons with disabilities" (from the Academy of Elder Law Attorneys' Aspirational Standards for the Practice of Elder Law). However, I recognize that, notwithstanding what elder law may mean and what areas it comprises, perception is very important, and if attorneys who consider themselves disability law attorneys will feel more inclined to join our section if we include the word disability, so be it.

There are concerns about what changes lie ahead for the identity of the Elder Law Section as it is perceived today. Disability law includes many subspecialties, such as attorneys whose practices focus on the Ameri-

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Nature v. Those We Nurture

2012 Elder Law Section Retreat

GLACIER NATIONAL PARK

AUGUST 7-13, 2012

CLE devoted to the exploration of Glacier National Park with time for fun, friends and a one-of-a-kind "scavenger hunt"

Sampling of CLE topics:

- Introducing Clients to Grizzly Bears Early Improves the Attorney-Client Relationship
- How Are Glaciers & Medicaid Funding Alike: A Critical Thinking Exercise
- Let Me Go in Glacier Park: End of Life Decisions and the Right to Die
- What to Tell the Northern Bog Lemming About HCBS & Medicaid in Florida
- Grabbing the Tail of a Wolverine—Ethical Issues in Cases That Bite
- A Ptarmigan, a Pygmy Shrew and a Lawyer Walk Into a Bar …
- Creating a Pet Trust for Your Favorite Grizzly Bear
- Keeping the Silver Tip Grizzly: The Value of the Aging Lawyer

Things to do in addition to great CLE programs:

- Grizzly bear watching
- Going-to-the-Sun Road tour
- Hike to Iceberg Lake
- Blackfeet Indian cultural tour

Watch your email inbox and your mailbox for registration and program materials.

Reservations for Elder Law Section reserved rooms are on a first-come basis and are only available to those who are 110 percent sure they will be attending.

To reserve an Elder Law Section reserved room, contact Emma Hemness via email at hemness-elderlaw@aol.com BEFORE MAY 27, 2012. Rooms are available on a first-come basis. Then we will keep a waiting list. There will be plenty of lodging OUTSIDE the park, about 30 to 45 minutes from the west entrance to Glacier, in Kalispell or Whitefish, Montana.

Message from the chair-elect:

The value of involvement

by Twyla Sketchley

When Enrique Zamora asked me for a chair-elect message, I was really at a loss for something to say. It is the chair, our leader, who provides our message. Our chair, through his message, provides the section with its vision, chronicles the section's achievements and congratulates the section's members on outstanding accomplishments. In all the organizations in which I have been involved, it is the chair-elect who waits in the wings, quietly carrying out the directives of the chair while she learns the ropes and lets the chair bask in the "glory" of the leadership's accomplishments. And that is what struck me most about Enrique's request—I was being given yet another opportunity to shine in a section that has, from the beginning, been a safe and welcoming place to hone my skills, build my practice and develop leadership skills.

For more than a decade, I have been a member of the Elder Law Section of The Florida Bar. I started my service in the ELS under the encouragement of Lauchlin Waldoch, a past chair of the section. She invited me to every ELS function, including my first retreat, held right after 9/11 and during a hurricane. Turnout was small, given the circumstances, but I got an opportunity to meet and develop professional relationships with some of the brightest minds of the section. This was an invaluable opportunity for a brand new lawyer.

Due to the encouragement I received from section members at that retreat, I continued to attend every ELS event. At first I left those events terrified I had missed something in my cases, and I returned to my office to review each and every one to be sure I had correctly worked them. I developed new forms, asked better questions of my clients and became a better practitioner. (I add this so if a young attorney has the same feeling, he or she will know it has happened to at least one other attorney and is probably normal.) While I no longer feel that terror, I still get something new out of every ELS function and improve my practice in some way each time.

After attending a few section events, I joined a committee. Suddenly I was "in the loop." I was receiving information on new case law, proposed legislation and changes in regulation, sometimes before the changes were public. What had started as a little bit of involvement grew into a larger commitment, which led to greater knowledge and a better practice. I used this "cutting edge" knowledge to provide warnings to my clients and my community about potential changes.

Through my involvement with the section's committees, I developed professional mentor relationships and personal friendships. When I had questions, I had access to section members from across the state, all who were smarter than I and who helped me find answers when I was stumped or who provided a supportive voice when I needed one. I received so much encouragement from section members like Carolyn Sawyer, Emma Hemness, Len Mondschein, Ellen Morris, David Lillesand, Babette Bach, Linda Chamberlain and Steve Quinnell. The support I received helped me develop a strong practice.

In time, I was invited to chair section committees and to speak at CLE programs. I did not feel like an expert of any kind, but still I was being given an opportunity to shine. I was asked to provide my opinion on section issues. I wrote articles for *The Advocate*. I was invited to help the section respond on matters of important public policy. The section committee process nurtured my knowledge and confidence, which not only helped me become a better lawyer, but also helped me better interact with people, advocate within the legislative and agency regulation processes, and problem solve.

When ELS leaders asked me to join the Executive Committee, I was astonished. The individuals I looked up to as mentors and role models were asking me to become a leader! I questioned why they were making such a request, but like so many times before, I accepted their invitation, hoping they knew something I did not. Yet again, the section gave me an opportunity to shine as well as develop some unique administrative skills, such as doing budget reviews and taking better meeting minutes …

Now, as I prepare to become chair of the Elder Law Section in a few months, I find myself thinking about what the section has meant to me over the past decade. It has been a source of support and strength in my practice. It has given me mentors. It has helped me develop expertise. It has allowed me to develop friendships. It has presented me with an opportunity to build and maintain a reputation. In short, my involvement in the ELS has been as valuable to my practice as a working computer system and my ability to research the law.

The one thing I would like every member of the ELS to know is that involvement in the section is valuable. I encourage every member to

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From the chair-elect
from preceding page

commit to dedicating just 10 hours over the next year to involvement in the section. A 10-hour yearly commitment (less than one hour per month) translates to doing *just one* of the following activities: 1) joining and participating in a committee for the next year; 2) writing one substantive article for *The Advocate*; 3) volunteering to write materials and present one hour of a CLE a year; 4) attending every *free* mentoring CLE teleconference throughout the year; 5) volunteering to be a mentor to the section's new attorneys; 6) helping update, improve and maintain the section's website; 7) volunteering to be an geographical area team leader for legislative advocacy coordinated by the section; or 8) volunteering to review a Florida Senate or House bill and follow it through the yearly legislative session. This is not an exhaustive list of opportunities to participate in the section. The ELS will find a way to accept the commitment of your talents. I assure you that you will receive more value from your participation than the time you give.

* * * * *

ELS Mentoring Committee presents 'Tricks of the Trade'

The Elder Law Section Mentoring Committee is hosting a series of teleconferences titled "Tricks of the Trade." The purpose of the teleconferences is to provide help to newer attorneys in establishing their practices.

Each teleconference will cover a different area of elder law. One or two mentors will lead the discussions, with 10 to 20 minutes of introductions and tips for mentees. The remainder of the call time will be open for a casual question and answer session on the call's topic. Although the teleconferences are focused on providing assistance to newer elder law attorneys, all members of the Elder Law Section are welcome to participate. The teleconferences are free, and the course number and credit information will be given during the call or sent to registrants afterward.

The next call will be **Thursday, May 3, 2012, 12 noon - 1 p.m. (EDT)**

An email notice with the call-in information will go out to all section members prior to the teleconference.

MARK YOUR CALENDAR!

May 3, 2012 • 12 noon-1 p.m.
"TRICKS OF THE TRADE" TELECONFERENCE
(An email with the call-in information will be sent to all section members prior to the teleconference.)

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

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

May 31, 2012 • 6 - 7:30 p.m.
ELDER LAW SECTION EXECUTIVE COUNCIL MEETING
Sandpearl Resort
Clearwater Beach, Fla.

June 1, 2012 • 9 a.m. - 3 p.m.
LONG-RANGE PLANNING MEETING
Sandpearl Resort
Clearwater Beach, Fla.

June 2, 2012 • 9-11 a.m.
SECTION CHAIR'S TRAINING
Sandpearl Resort
Clearwater Beach, Fla.

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

Why an 'Elder Concert'?

by Scott Solkoff

The Elder Concert is a one-day multidisciplinary conference of elder care professionals from throughout the state of Florida. The program has led the way in collaborative elder care since 2001.

Elder care professionals have huge hearts, and the successful ones know how to do well by doing good. When I attend conferences outside of the elder care field, I am struck by how the profit motive is the main focus. Successful elder care professionals can also make money, but our main focus is on improving the quality of lives of those we serve. By doing good for others, we do well for ourselves. The elder care culture elevates those who bring the greatest positive change whereas other professions often elevate those who bring in the greatest profits regardless of positive impact. While I see this difference very clearly when I attend other professions' conferences, the point is driven home even more when other professionals come to our conferences. I hear such comments as "Wow, you guys really believe this stuff," or I get the more sarcastic "I thought ya'll were going to break into Kumbaya at any moment."

Mission of collaboration

Authenticity and well-directed passion are hard to find these days. Elder care professionals really have it. We believe in what we do, and we are seeking better ways of reaching our shared ultimate mission: improving the quality of life of those whom we have the good fortune to serve. The Elder Concert embodies this shared mission with a collaborative philosophy.

The belief underlying the Elder Concert is that no one elder care professional can fulfill the "quality of life mission" alone; it is only through collaboration that we succeed. To some, "collaboration" means making referrals to other allied providers. While attendees will meet many new referral sources at the Elder Concert, "collaboration" is elevated to a new height of information-sharing, hands-on networking and multidisciplinary coverage of shared topics.

A true concert

At the Elder Concert, the attendees are the teachers. Each breakout session has a topic and a facilitator. The facilitator for each topic is a knowledgeable subject matter expert who lays out the topic and gets the room going. The Elder Concert assembles the players, provides each room with a "conductor" and with those elements a symphonic collaborative magic results. Each player brings his or her own instrument and is given space to play. At most single-discipline conferences, all attendees have pretty

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Here is what others have said about the Elder Concert:

"It is beneficial to my practice as a professional guardian, expanding my knowledge within the field of elder law, legislation and guardianship. After attending, I find myself excited, recharged and reconnected to those sharing similar areas of service to our most vulnerable populations."

Jetta L. Getty, NCG-CG

"I appreciate learning new legal innuendos regarding elder issues I face daily and the wonderful networking opportunity with professionals who deal with elder issues."

Suzanne Lewis, certified professional guardian,
Savvy Senior Solutions Inc., Fort Lauderdale, Fla.

"Last year I was able to catch up with the latest updates on critical senior topics. It is an excellent way for me to gather multidisciplinary information when working with elders and the disabled."

Pamela Salomone, RN, CMC, certified geriatric care manager,
Critical Care Management LLC, Boynton Beach, Fla.

"*I found the Elder Concert to be a very satisfying experience because the programs dealt with real issues and provided nuts and bolts information, a breath of fresh air from the usual hot air, ivory tower seminars!"*

Robert P.M. Nordstrom, senior advocate and
retired Michigan probate judge

"Very few events allow for such a high level of interaction among participants. I regularly encourage my professional guardian to make this event one they shouldn't miss."

Michelle Kenney, NCG emeritus/paralegal,
Florida Elder Law Concepts PA, Boca Raton, Fla.

Why an 'elder concert'?

from preceding page

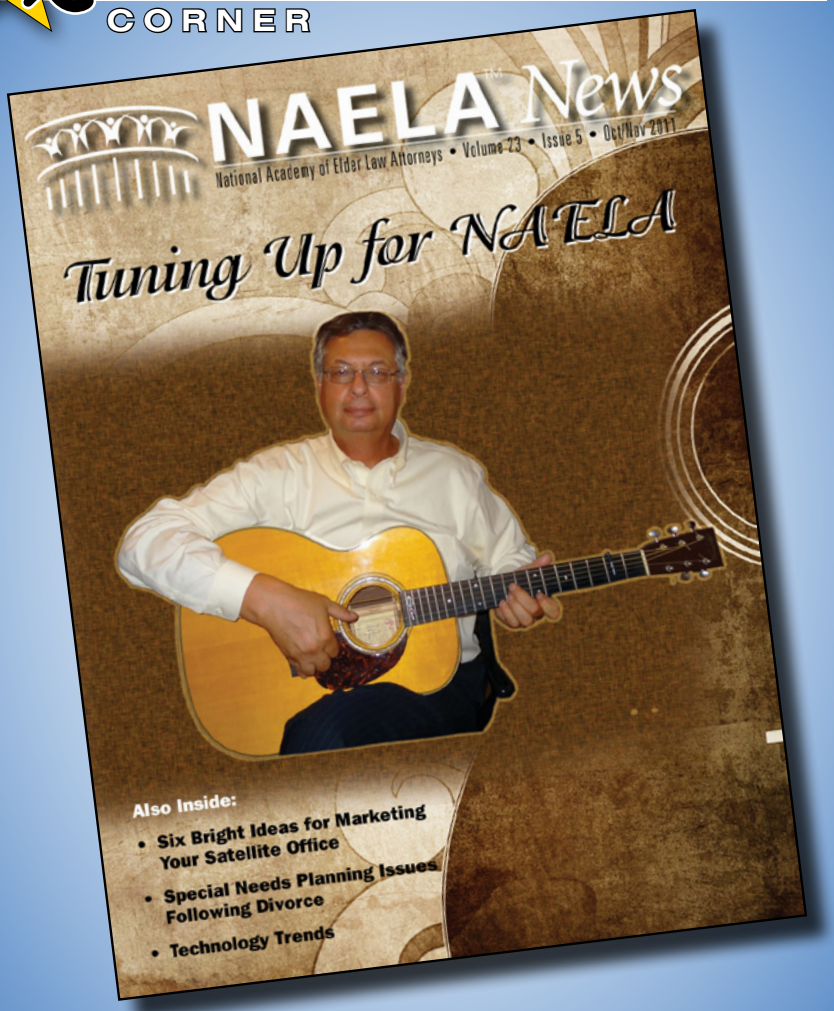
much the same instrument, and the point of the conference is to get into tune. At the Elder Concert, we have different fields—woodwinds, strings, percussion, brass—guardians, lawyers, accountants, facility administrators, social workers, care managers. Thus, when the topic is presented, all views or instruments are heard. This leads to an unparalleled and fun collaborative learning and networking experience.

This year, the Academy of Florida Elder Law Attorneys welcomes the following partnering organizations to the 11th Annual Elder Concert: The Florida Bar's Elder Law Section, Florida Assisted Living Coalition, Florida Institute of Certified Public Accountants and Florida State Guardianship Association. When you receive registration materials, please register promptly. Space is limited to allow for greater interaction.

To accommodate travel for 2012, the Elder Concert takes place May 4 in Tampa and then again on May 11 in Fort Lauderdale. For more information, please visit *www.afela.org*.

***Scott Solkoff** is the chair emeritus of the Elder Concert. You can register for the Elder Concert at **www.afela.org**.*

Kudos Corner



Congratulations to Len Mondschein for being featured on the cover of *NAELA News!*

Message from the chair

from page 3

cans with Disabilities Act and criminal law attorneys who represent individuals with mental illnesses who commit crimes, including crimes against elders. Can the section meet their needs, notwithstanding the name change? I don't know, but I hope we can.

What changes to the structure of the section will this name change require? Clearly, we will have to amend our bylaws. We will have to consider modifying our mission statement, and we will probably need to add new committees. We will have to consider adding new legislative positions and perhaps change or amend our present positions. There is no question that changing the name of the section will require extensive planning. However, I feel confident that we have highly qualified members that will guide us through this time of change. I have scheduled a long-range planning meeting of the Executive Council for June 1, 2012, at the Sand Pearl in Clearwater, Fla. I invite you to join us in helping define the future course of this section. This section is you—each one of you—for a grand total of 1,599 members. This section's leadership needs your input as we move forward into an uncertain future. I hope to see you in Clearwater.

How to make electronically filed documents accessible to individuals with disabilities

by Judith Equels and Twyla Sketchley

Over the next year, all documents filed in state court (with some limited exceptions) must be filed electronically. In addition, attorneys must also make each electronically filed document accessible to individuals with disabilities. Florida Rule of Judicial Administration 2.525 requires all documents filed electronically to comply with the accessibility requirements of the Florida Rule of Judicial Administration 2.526. Rule of Judicial Administration 5.526 states:

> Accessibility of Information and Technology: *Any document that is or will become a judicial branch record, as defined in Rule 2.420(b)(1), and that is transmitted in an electronic form, as defined in rule 2.525, must be formatted in a manner that complies with all state and federal laws requiring that electronic judicial records be accessible to persons with disabilities, including without limitation the Americans with Disabilities Act and Section 508 of the federal Rehabilitation Act of 1973 as incorporated into Florida law by Section 282.603(1), Florida Statutes (2010), and any related federal or state regulations or administrative rules.*

What does it mean to have an accessible document in compliance with the "Americans with Disabilities Act and Section 508 of the Federal Rehabilitation Act of 1973 as incorporated into Florida law by Section 282.603(1)"? It means that the document can be used by an individual with disabilities such as blindness, low vision and mobility impairments. Accessible electronic documents are formatted so persons with a disability can view those documents with, and oftentimes without, the aid of assistive software or devices.

This article is a brief summary of common issues an attorney should pay attention to when creating an accessible document for electronic submission. This is not a summary of all issues. The federal courts have required electronic filing and accessible electronic documents for several years. However, many lawyers are not aware of what accessibility means and essentially ignore that requirement. As of the date of this submission, the authors are aware of a recent case in which the federal court filing system rejected a document due to lack of accessibility. This is a reminder that accessibility is not just a laudable goal; it is a requirement.

To begin creating accessible documents, it is recommended that attorneys upgrade their software to Microsoft Word 2007 or newer and Adobe Acrobat Professional Version 9 or newer. Any software references within this article refer to these two programs. To determine the accessibility functions in other software programs, review the tutorials in those programs for information on creating accessible documents.

From the moment one begins creating a document in a word processing program, accessibility must be addressed. The first concern is the font. Use a font that is easy to read. These include fonts that attorneys are probably already using pursuant to local court rules: Times New Roman, Arial and Courier New. The font should also be large enough to be readable, no smaller than 12 point font, but 14 point font is probably preferable. Stay away from decorative, diminutive or unusual fonts.

Many attorneys express their creativity through the use of various font types, colors, bolding, underlining and varying font sizes throughout the same document. This creativity prevents accessibility. An accessible document uses the same font throughout the document and limits the use of **bold**, underlining, *italics* and ALL CAPS. Also avoid using repetitive punctuation marks such as … or !!! or ?!?. Also remember, there must be sufficient contrast between text and background for the document to be read by anyone. Use black letters on white background to ensure maximum accessibility. In short, creativity in a court document should be limited to the creativity in the writing, not the appearance of the text.

When formatting a document, be sure to use the specific formatting features of the word processing program. Use the tab key to indent paragraphs instead of using the space key. In addition, use the automatic numbering formatting in the word processor to format paragraph and subparagraph numbers. Also be sure to use proper heading levels and styles to create uniformity throughout the document. Formatting command icons can be moved onto a tool bar in Microsoft Word to make these formatting options easy to use.

When creating documents, remove floating objects such as text boxes and the objects in Microsoft's drawing toolbar. Text boxes or inserted columns for formatting purposes can often be replaced with data tables or by using the indent format functions to indent entire paragraphs or lines for better readability and accessibility.

Including tables, charts and graphs in documents requires that they be properly labeled, including descriptive headings for each row and/or

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column so screen readers can pick up on the content in a way that is understood and logical. Also, all row headings in tables must continue from page to page when a table continues onto a new page. This can be done within the options in the word processing program.

For charts and graphs, as well as photographs within documents, use the "alternative text" option in the word processing program to add a descriptive caption to the chart, graph or photograph. Properly used captions that specifically describe the photograph, the trend of the change in a graph or chart, or the information conveyed by your chart or graph allows anyone who cannot see the item to know what it is and the information provided.

One difficulty in creating accessible documents is properly providing access to websites or other hyperlinked items to which the document may refer. Often a document (or website) will say: "For more information click here." These references convey no information. There is usually no reference to where the hyperlink takes the reader or what the website might be. To use accessible hyperlinks in a document, use the website or name and create an accessible hyperlink to the name or web address. To do this, type the web address or name such as *www.eldersection.org* or The Elder Law Section of The Florida Bar. Then highlight the web address or name and right-click. Choose "hyperlink" and insert the web address to be a hyperlink to the highlighted words, and the word processing program will create a hyperlink. This allows a reader to click on the web address or name and go directly to the website or web page referenced.

Finally, when creating a document in a word processing program, avoid placing footnotes, endnotes or other information in headers and footers. Place only the important document identification information in those headers and footers, such as the document's title, the page numbers or case identification information.

Once an accessible word processing document has been created, an accessible PDF can be created. First, because the Florida Constitution requires all court filings to be in English, make sure all language tabs are set to English. Then run the PDF accessibility setup assistant in the Word document. Then create a PDF document from there.

Once the document is a PDF, run the Adobe Acrobat accessibility checker on the PDF document. There are quick and full check accessibility checkers in Adobe Acrobat Professional Version 9. The quick check function will let the creator know if there are accessibility issues that need to be fixed. If so, the creator can run the full check to identify and correct those issues. Once the accessibility checker states there are no accessibility issues, the document can be saved and electronically filed.

For a more thorough tutorial on accessibility issues in e-filing and how to create accessible documents, see The Florida Bar Law Office Management Assistance Services' program *Digital Accessibility of Documents Electronically Transmitted to Florida Courts*, which is available to all Florida Bar members for free through The Florida Bar website's CLE page. This program is an audio-visual presentation that includes written materials, the Rules of Judicial Administration, a PowerPoint presentation and web shots of the various referenced tutorials.

***Judith Equels** is the executive director of The Florida Bar's Law Office Management Assistance Service (LOMAS).*

***Twyla Sketchley, BCS,** is a Florida Bar board certified elder law attorney with The Sketchley Law Firm PA and the chair-elect of The Florida Bar Elder Law Section.*

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.

Don't draft that special needs trust!

(or why the Obama health care law is costing me lots of lost fees)

by David Lillesand

The client has been without insurance for several years, but now has an unexpected and serious medical condition and faces costly treatment in the hundreds of thousands of dollars. She heard you can get her on Medicaid through a special needs trust.

Better, you say. I can help you have no Medicaid lien payback at death, avoid legal fees, avoid monthly trustee fees and allow you to get the best health insurance policy in America. It's the one U.S. senators and congresspersons wrote for themselves, and it is administered by a nonprofit health insurance company in existence for more than 65 years. And you, dear client, get to keep full control of your assets! You'll have the health insurance in effect in as little as one day.

Any attorney who failed to offer that option, where appropriate, would probably need to be calling his or her legal malpractice carrier.

As part of the Obama health care law, the Patient Protection and Affordable Care Act (PPACA), which became effective on Mar. 23, 2010, Congress included the Republican proposal for a Pre-Existing Condition Insurance Program (PCIP), which became effective in Florida on Aug. 1, 2010. This is a temporary program until the full PPACA provisions become effective on Jan. 1, 2014, when no insurance company may decline health insurance due to a preexisting health condition.

Because PCIP health insurance takes all applicants, and because Congress was afraid health insurance companies would "dump" their most expensive insureds, the PCIP plan requires that the individual has been uninsured for six months prior to the application. Other requirements are that the individual has been turned down for health insurance, or that he or she has a letter from a physician or an ARNP attesting to a chronic medical problem, and that the person is a citizen of the United States or a lawfully admitted non-citizen.

Rather than create a federal bureaucracy to administer the Republican PCIP program, Obama chose to allow persons previously excluded from the health insurance market to purchase the same insurance that Congress has, using the same private, nonprofit company. States were free to develop or maintain their own plan. Florida chose to participate in the federal plan. The process is simple: Go to *www.pcip.gov*, and click on "Florida" to fill out the easy application. Persons who apply are covered the first of the following month. No waiting period. No insurance agent required. Purchasing the insurance is done via the Internet. The terms of the insurance are described at *www.pciplan.com*.

As noted above, the plan began last August. The initial rates were already below our law firm's best health insurance policy with Blue Cross Blue Shield. However, in January 2011, new rates were announced for both our policy and for those on the PCIP insurance. As expected, our law firm's rates went up. The PCIP plan? Rates went down!

In May 2011, the PCIP rates were adjusted. Again they went down, and new options were added.

Please note the rates have changed in Florida as of July 1, 2011. The monthly premiums for Florida are shown in the table below.

The additional terms for the insurance are as follows:

- PCIP applicants who are approved to participate in PCIP can choose from three plan options, with different levels of premiums, calendar year deductibles, prescription deductibles and prescription co-pays. The HSA Option provides an opportunity to open a Health Savings Account, a tax-exempt account where you can deposit funds for eligible medical expenses. Each of the three PCIP plan options provides preventive care (paid at 100 percent, with no deductible) when you see an in-network doctor and the doctor indicates preventive diagnosis. Included are annual physicals, flu shots, routine mammograms and cancer screenings. For other care, you will pay a deductible before PCIP pays for your health care and prescriptions. After you pay the deductible, you will pay 20 percent of medical costs in-network. The maximum you will pay out-of-pocket for covered services in a calendar year is $5,950 in-network/$7,000 out-of-network.

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Standard Plan		Extended Plan		HSA Plan	
Age	**Rate**	**Age**	**Rate**	**Age**	**Rate**
00-18	$118	00-18	$158	00-18	$122
19-34	$176	19-34	$237	19-34	$183
35-44	$211	35-44	$284	35-44	$220
45-54	$270	45-54	$363	45-54	$280
55+	$376	55+	$505	55+	$390

There is no lifetime maximum or cap on the amount the plan pays for your care.

- If you apply for PCIP coverage, you will be billed for the premium once your application is approved. You will need to send in your payment in order for your coverage to be effective. Please do not send in the premium before you are billed. Note that your premium may increase if you age into a higher rate tier, or if PCIP adjusts its premiums to any changes in the commercial market.

The rate for a 30-year-old of $176 per month ($2,112 per year) is far below what any trustee of a special needs trust would charge to administer even a modest d4A special needs trust. Most bank trust companies have minimum charges of $12,000 to $15,000 per year. Even for a 55-year-old person with disabilities seeking a special needs trust, the health insurance premium of $4,512 annually plus the maximum out-of-pocket deductible of $5,950 is still less than just the cost of the trustee fee alone.

Is PCIP for everyone? Well, almost. Of those on Medicaid, only 1 in 20 is in a nursing home or receiving home and community-based services. PCIP is health insurance. It is not residential services or alternatives to them provided by the Medicaid ICP programs. Medicaid ICP benefits are critical to those clients. Surprisingly, 40 percent of all nursing home residents are under age 65.

But for the 19 of 20 clients who are searching for access to community medical care, the PCIP program is heaven-sent and a hugely better alternative than the Medically Needy program.

A strategy that may get the best of both worlds for even some ICP clients is to acquire the PCIP health insurance first, and then complete the Medicaid ICP application. Reason? Like all private insurance, there is no requirement that a person give up private insurance when entering a nursing home. But PCIP will not be granted to persons who already have Medicaid, Medicare or other private health insurance.

Besides avoiding the Medicaid payback lien and the Medicaid restriction on services, PCIP is attractive because the doctors and hospitals on the PCIP insurance are the best in Florida. Why? Because the reimbursement rates are the highest of the health insurance plans in effect in Florida, according to physicians interviewed. As one put it, "We love to see patients at the front desk showing that insurance card." The best specialists at the best hospitals versus the trouble most clients have accessing even Medicaid primary care providers make PCIP an attractive option. You can check to see whether your physicians are on the PCIP plan by visiting *www.pciplan.com*, clicking "Find a Provider" and typing in your ZIP code.

The PCIP program is not a Medicaid program and not a freebie. Clients pay the monthly premium to get the coverage. But careful consideration of avoidance of the Medicaid lien, the best doctors, no lifetime cap, no annual cap, no rescission, no Medicaid managed care and premiums that are less than the cost of maintaining a special needs trust make PCIP a necessary first arrow in your quiver of health access solutions.

And did I mention, no lien for medical care at death? Woe to the attorney who must face the angry heirs explaining why their inheritance just went to pay the Medicaid SNT or estate recovery liens, when a better option should have been on the table.

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.*

Florida's Emergency Temporary Guardianship Statute:

Is it unconstitutional as a violation of procedural due process?

by Nova D. Muhlenberg Bonnett

Under Florida's Emergency Temporary Guardianship Statute, F.S. 744.3031, an emergency temporary guardian's (ETG) authority and responsibility begin upon the issuance of letters of ETG. Section 744.345 requires that these letters specify whether the guardianship covers the person and/or the person's property, and whether the guardianship is to be plenary or limited. The court can appoint an ETG *on its own motion* if no petition for guardianship has been filed, and the court must find that there is imminent danger to the alleged incapacitated person's (AIP) person or property (but *not* that the AIP is a danger to oneself or others, as would be the case with an involuntary commitment).

An ETG can be appointed only after a petition for determination of incapacity has been filed, but prior to appointment of a guardian. The requirement is only that the petition for incapacity be *filed*; there is no requirement that incapacity be already determined. Once appointed, the ETG's authority lasts for 90 days with the possibility of an additional 90 days (a total of six months), if the court finds that necessary, with ETG powers and duties specifically enumerated in the letters. Although the court appoints counsel to represent the AIP "during such summary proceedings," there is no notice requirement and no guidance as to what appointed counsel is to do or how much time he or she has to do it. Does counsel argue on behalf of the AIP, or does he or she merely ensure the client is treated according to statute? As to due process, *nowhere in the provision is there a requirement for notice or an impartial proceeding, nor the right of the AIP to be present or to testify*. In essence, someone could file a guardianship petition and then temporarily end run the procedural aspects of that petition by immediately filing for an ETG.

The Fifth and 14th Amendments to the U.S. Constitution guarantee that no person may be deprived of life, liberty or property without due process of law. Due process must be both substantive (government actions must be rational or reasonable) and procedural (essentially "fair"). The hallmarks of procedural due process are notice, the opportunity to be heard and an impartial proceeding. *Zinermon v. Burch*, 494 U.S. 113 (1990), addressed the issue of procedural due process in an involuntary commitment in Florida, and the court made clear that in such cases there is a requirement that due process procedures be initiated where patients are unwilling or unable to give consent. Under Florida law, part of that procedure is an involuntary placement hearing. Further, under *O'Connor v. Donaldson*, 422 U.S. 563 (1975), it is unconstitutional to involuntarily confine mentally ill persons if they are "dangerous to no one and can live safely in freedom." Shouldn't the same be true for someone who is (allegedly) incapacitated?

Given that the appointment of an ETG can be easily analogized to an involuntary commitment (because both involve loss of liberty, property and fundamental civil rights, even if only for a relatively brief period), it would seem obvious that appointment of an ETG should require similar due process procedures. Lacking these procedures, it appears that the Florida ETG Statute is unconstitutional on its face.

The sad truth is that the likelihood of bringing this statute into due process conformity has or will have involved the pain and stress of a very real person's attempt to retain his or her own civil rights in the context of ETG proceedings. One would hope the Legislature would act in advance of that, sparing an AIP the ordeal of the present ETG process and the inevitable constitutional challenge to this statute.

Nova D. Muhlenberg Bonnett *earned her J.D. from Nova Southeastern University, Shepard Broad Law Center in May 2010. She is a candidate for an LL.M. in elder law from Stetson University College of Law, anticipated graduation in December 2011. Muhlenberg Bonnett was a paralegal and legal secretary for 20 years before attending law school. Her primary legal focus is social justice, particularly with regard to children, the disabled, veterans and the elderly. She practices in Largo, Fla.*

When annuities and the elderly do not mix

by Gregory A. Martoccio

This article outlines some of the most common problems an attorney encounters when an elderly client seeks legal advice regarding his or her ownership of a deferred or variable annuity. The commission rates paid to the agents, the length of time for deferred payments and the rate of return are an approximation based upon my personal knowledge and that of other elder law attorneys who have graciously given me the time to discuss their experiences in this area.

Basic information

An annuity is a contract between an investor and usually an insurance company, wherein the investor deposits funds (in a lump sum or over time) and the insurance company guarantees payments to the investor, with interest, over a certain timeframe.

A deferred annuity will begin to make periodic payments to the investor only after a period of years from the date of the initial deposit. Usually the longer the deferral period, the higher the rate of guaranteed interest.

A variable annuity may be deferred as well; however, the primary difference is that the rate of return, if any, on deposited funds is not guaranteed and will fluctuate depending on how the deposited funds are invested.

The purchase of a deferred or variable annuity may be an appropriate investment when a person is healthy, upwardly mobile, earning income and building one's wealth. A deferred or variable annuity may be an appropriate investment when it is used as one component of a person's overall retirement income strategy.

Conversely, a deferred or variable annuity purchased by someone who has already reached retirement age, who is no longer earning income, who has diminishing assets and whose health or the health of a spouse may be compromised now or in the future may present problems. Unfortunately, seniors appear to be the focus of high-pressure marketing, misinformation and scare tactics. This article focuses on the most common "red flags" the attorney may encounter and what, if anything, the attorney can do to assist elderly clients.

Misplaced trust

The most aggressive marketers of annuities to seniors are often their most trusted confidants—the "friendly" bankers or insurance agents the elderly client has come to know and trust. These friendly people are privy to the senior's most private financial information, such as the amount of available cash, when certificates of deposit mature or what retirement account can be converted into an annuity. The incentive of high commissions (usually 15 percent or more) to the agent upon selling an annuity, coupled with the knowledge of how much or when an elderly person may have available cash to purchase an annuity, makes the elderly easy prey for a "trusted" banker or agent. Many times, the elderly are reluctant to admit they blindly trusted their advisors or did not understand the complexity of the annuity, because they are too embarrassed to admit their mistake or fear they may be seen as senile. The attorney's first task is to reassure and educate the elderly client that an annuity is a complex investment and that the compensation structure to the selling agent of the annuity can induce a conflict of interest, misinformation, confusion and even fraud.

Unsuitability

With a deferred annuity, the deferral periods generally last 10 to 15 years after the initial deposit. As you can imagine, deferring payment to an investor who is already 65 years of age or older may result in the investor never seeing the "guaranteed" income payments since the periodic payments begin after the person's life expectancy has been reached. As a side note, I have seen an insurance company approve the sale of a 20-year deferred annuity to an 89-year-old nursing home resident. I am of the opinion that the sale of a 10^{+}-year deferred annuity to anyone over 65 years of age is uniformly unsuitable.

As seniors begin to fear outliving their money and worry about becoming a burden to their children, some agents feed upon such fear to sell them deferred annuities that best enhance the agent's commission, rather than informing elderly investors of the negative ramifications of the investment. These agents often convince elderly investors that their current investments are yielding too little income and that a deferred annuity is the answer to their problems.

Such an agent either overlooks or does not care how much of the elderly investor's overall assets are included in the annuity. In effect, the elderly investor is set up for failure. For example, I have seen a 10-year deferred annuity sold to an 85-year-old nursing home resident, diagnosed with advanced Parkinson's disease, and the agent convinced him to invest 100 percent of his available assets in the annuity. I am not convinced this example is the exception, but rather it is closer to the rule. Some of the other topics in this article also evidence the unsuitability of a deferred or variable annuity; they require separate headings to provide more detail.

Lack of understanding/ excessive complexity

The excessive up-front compensation to the agent, which is payable to

continued, next page

Annuities and the elderly
from preceding page

the agent in full upon receipt of the deposit into the deferred or variable annuity, creates a conflict of interest and encourages a lack of disclosure. The amount of the agent's compensation is hidden from the investor because it is paid by the insurance company directly to the agent from the proceeds of the deposit.

Moreover, the agent can confuse matters by telling half-truths to investors by stating that if they need their funds early, they can access their funds upon request. While this is technically true, please see "Excessive fees and expenses" below as they relate to early withdrawals.

Two of the most complex annuities are the variable annuity (VA) and the highly complex equity indexed annuity (EIA). These types of annuities appreciate or depreciate depending on the performance of the underlying investments. In addition, there are numerous and ongoing related fees and expenses associated with these types of annuities, regardless of the performance of the invested asset. In addition to the recurring fees, the ever present "surrender" fee for early withdrawal remains. In September 2010, FINRA (*www.finra.org*) issued an investor alert related to EIAs. Because these annuities are not regulated by the Securities and Exchange Commission and because the extremely complicated features, such as the method of calculating the return on an index, interest rate caps and spread/margin/assets fees are so varied from company to company, extremely complex and subject to change by each company, FINRA cautioned all investors regarding their purchase.

Lack of liquidity

It is not hard to imagine that a senior who purchases a deferred annuity, a VA or an EIA may experience a medical emergency or other major expense that requires the elderly investor to liquidate his or her investment before the surrender period expires. The cost of canceling the policy or the early withdrawal of a deposit will trigger a steep penalty and unforeseen, adverse tax consequences. With the wild fluctuation of the stock market, many seniors are reassured by the sales pitch of a "guaranteed" rate of return on their investments as a way to preserve their assets. Unfortunately, the elderly investor learns of the substantial fees, costs and possible loss on investment only after he or she has purchased the annuity. Therefore, this safety guarantee is no guarantee at all if a client needs the funds during the surrender period.

Excessive fees and expenses

Surrender charges, or other clever names that apply to fees for cancelation or early withdrawal, slightly decrease over many years. I have witnessed surrender fees beginning at 25 percent and slowly decreasing over many years to 10 percent. These excessive fees may have to be incurred if an elderly client has no other resources and thereby loses a substantial amount of the client's limited funds.

Replacing the annuity with a 'better' annuity

One area of abuse I have yet to witness personally is an agent continually changing the elderly client's annuity into a "better" product. Evidently, annuity switching is not new or uncommon. In May 2011, a FINRA arbitration panel ordered Raymond James to pay $1.5 million to an elderly Texas man after his agent exchanged one annuity for another during a four-year period. The man's attorney stated that the exchange of annuities "… is a huge red flag, because usually it does not make economic sense … it incurred substantial penalties and that is what in large part made the transactions unsuitable." In November 2011, National Future Benefits settled with the Arizona attorney general for $866,000 and was subsequently sued by Midland National Life Insurance Co. and North American Company for Life and Health for "engaging in a systematic and deceptive effort to replace large numbers of annuity contracts." National Future stated that it had found a "better" annuity for approximately $500 million of annuities. The lawsuits are ongoing.

Now that elderly consumers are fighting back, class action attorneys have a long line of cases pending against American Equity Investment Life

Insurance Co., American Investors, American Equity, Allianz, Fidelity and Guaranty, National Western, AIG, AmerUs, Lincoln National and John Hancock[1] for a variety of wrongdoing.

Medicaid eligibility and annuities

If a person is applying for Medicaid ICP, HCBS waivers, institutionalized MEDS-AD, PACE or institutionalized hospice, the Florida Department of Children and Families is on the lookout for the ownership of any annuity.[2] Only immediate annuities can be used to convert an asset into an income stream. On or after Nov. 1, 2007, any conversion of an exempt asset by the applicant or the community spouse (CS) into an immediate annuity requires strict Deficit Reduction Act (DRA) criteria. For the applicant to meet the DRA requirements, the immediate annuity must 1) name the State of Florida as primary beneficiary, unless the applicant has a spouse or a minor or disabled child, in which case the State of Florida must be named secondary beneficiary; 2) the annuity must be non-assignable and irrevocable; 3) the annuity must make payments in equal amounts throughout its term; and 4) the annuity must be paid out over the life expectancy of the recipient in accordance with SSA table HCFA Transmittal 64. If the applicant has a deferred annuity, a VA or an EIA, the only option may be cancellation, which triggers the fees, costs and surrender penalty.

What to do for your client when you believe he or she has been harmed

One of the largest impediments to taking corrective actions may be your client. An elderly client may not want you to write a strongly worded letter, let alone file a civil suit against his or her trusted advisor. Some of my elderly clients have been extremely loyal (to a fault) when it comes to causing problems for their insurance agents or "friends" at the bank.

If a client sees that he or she has been taken advantage of, the first thing I do is write a scathing letter to the insurance company's legal department, detailing what I believe is the wrongdoing by the agent and demanding that the annuity be unwound with interest. Surprisingly, I have had decent success with this strategy. Perhaps the class action attorneys are serving their purpose.

If the company will not negotiate at all, I prepare the client early on that I intend to file a civil suit. I never threaten to file a civil suit unless 1) I have my client on board; 2) the facts if proven true constitute the elements of the count; and 3) I have researched the law. The common torts would include rescission, breach of fiduciary duty, fraud (suitability and lack of disclosure), constructive fraud (omissions and misrepresentation), undue influence, unfair and deceptive trade practices, and insufficient training and oversight of companies' agents. Even when the facts and the law are on your side, be aware that an elderly client may not have the wherewithal to see a protracted civil suit through to the end.

Submitted on behalf of the Financial Products Special Committee

Gregory A. Martoccio *graduated from Stetson University with a major in accounting and received his J.D. from the University of Florida. He is a member of the National Academy of Elder Care Attorneys (NAELA), the Real Property, Probate and Trust Law, Elder Law and Business Law sections of The Florida Bar, as well as a member of the Tax Law, Real Property, Probate and Trust Law, and Business Law sections of the American Bar Association. He offers estate-planning services for simple and complex estates. As an elder law attorney, he offers disability, incapacitation and long-term care planning, which includes Medicaid and nursing home planning, asset transfers, special needs trusts, guardianship administration and litigation. He also has been involved in several areas of litigation regarding the representation of beneficiaries, trustees and/or personal representatives in probate and guardianship matters.*

Endnotes:

1 *Strube v. American Equity Inv. Life Ins. Co.,* 226F.R.D. 688 (2005)

In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig., 2008(E.D. Pa. 2008)

Bendzak v. Midland Nat'l. Life Ins. Co., 240 F.R.D. 449 (S.D. Iowa 2007)

Mooney v. Allianz Life Ins. Co. of N. Am., 244 F.R.D. 531 (D. Minn. 2007)

Cirzoveto v. AIG Annuity Ins. Co., (W.D. Tenn. filed Aug. 18, 2006)

Sayer v. AmSouth Inv. Sers., (11th Cir. June 28, 2007)

Smith v. John Hancock Life Ins. Co. (E.D. Pa. filed Aug. 31, 2006)

2 ESS Manual 1640.06009.01; 1640.6009.02; 1640.6009.03

Financial Products Special Committee

Jill J. Burzynski, chair

The Financial Products Special Committee had a busy quarter reviewing proposed legislation, including bills relating to annuities, life insurance and long-term care insurance. The committee submitted an article about annuity abuses for this edition of *The Elder Law Advocate* (see "When annuities and the elderly do not mix," page 15).

Medicaid Committee

John Clardy and Emma Hemness, co-chairs

Since the last issue of *The Elder Law Advocate*, the Medicaid Committee predominantly provided technical assistance on matters under review by the Joint Public Policy Task Force.

Members continued to assist with advocacy efforts by engaging in a second letter writing campaign in February to attempt to draw attention to the pending federal law waivers that mandate that all seniors receiving Medicaid be enrolled and have their care controlled by a managed care organization. Such letters expressed concern for the lack of detail within the 1915 (b) and (c) waivers pending before the Centers for Medicare and Medicaid Services (CMS) on significant issues such as quality assurance, grievance processes and performance measures, to name a few. This advocacy attempted to influence the Agency for Health Care Administration (AHCA) to improve the current waivers by expanding safeguards within them. Yet recently the Florida Legislature passed SB 730, which prevents the contracts governing the care provided seniors between AHCA and the managed care organization from being considered a rule or being subject to Chapter 120, thereby closing down another potential avenue to ensure adequate safeguards will be implemented. In addition, this same legislation continues to reject the inclusion of a medical loss ratio (MLR), which would mandate that managed care organizations spend a certain percentage, usually 80 or 85 percent, of each capitated payment on the senior's care. CMS previously stated its concern over the absence of the MLR to AHCA.

Based upon recent reports, AHCA and CMS mutually agreed to stop the timeline for approval of the waivers while AHCA works on areas of special concern to CMS. It is generally accepted, however, that CMS is reluctant to deny a state's request for waivers such as these. This affords another opportunity for the committee's membership, joined by other advocates for the elderly, to emphasize to CMS that quality of care assurances and adequate measures of performance can be gained only in a public forum and with inclusion of an MLR.

Earlier in the 2012 legislative session, the committee analyzed and developed discussion points on HB 1055. This proposed legislation sought to require the acceleration of life insurance policy death benefits to be used for long-term care expenses for individuals who become permanent residents of nursing homes. If the individual applied for Medicaid, Medicaid coverage would be denied until the proceeds from the conversion of the policy had been exhausted. Any remaining proceeds upon the death of the insured would be paid to the estate of the insured. Although this legislation did not pass during the session, it is believed that an advisory committee has been sanctioned within the appropriations bill to explore the feasibility of this legislation next session.

Committee members also provided technical assistance on one of three proposed rules being promulgated by the Department of Children & Families, changing the resource criteria for SSI-related Medicaid programs, including nursing home Medicaid and home and community based Medicaid rules. AFELA's administrative law attorney requested a public hearing to explore and provide comment on the ramifications of these changes to the resource criteria under the Florida Administrative Code. A task force member attended this public hearing on Mar. 21.

If you would like to join the Medicaid Committee and be one of the first to hear of impending developments that may affect your practice of elder law, please do not hesitate to contact the section's administrator, Arlee Colman, at *acolman@flabar.org*.

Resident/Facility Rights Special Committee

Aubrey E. Posey, chair

The Resident/Facility Rights Special Committee spent the last few months reviewing proposed legislation affecting residents living in long-term care facilities. Several bills were proposed during the 2012 legislative session in response to the *Miami Herald's* "Neglected to Death" series, detailing abuses, rights violations and other problems impacting residents who live in assisted living facilities (ALFs). Many of the bills proposed to increase staff training and monitoring of residents with mental health issues, both of which would have a positive impact on residents from the committee's perspective.

SB 2050 proposed a hearing process for residents in ALFs so they would not be relocated without receiving basic due process, specifically the right to challenge a proposed relocation or termination from the ALF; however,

no companion bill was proposed in the House.

On the last day of the 2012 session, HB 7133 was substituted for SB 2074, and negotiations were underway to try to pass some improvements to the ALF system. It appeared this bill would pass both houses, but in the end it did not pass. While it is a shame that increased resident protections and improvements for ALF residents were not made in any legislation, HB 7133 would have restricted residents' rights even further by reducing the time period for notice of relocation or termination of residency to 30 days, as opposed to the current 45 days that an ALF must provide to a resident. It would have added an almost meaningless grievance policy, allowing residents to postpone their relocation by 15 days when they filed a grievance with the facility.

Unlicensed Practice of Law Special Committee

John R. Frazier, chair

The UPL Special Committee has continued to explore the possibility of a Florida Supreme Court advisory opinion to address the conduct of non-attorney Medicaid planners. The Ohio Supreme Court issued an advisory opinion in 2011, which addressed this same issue in Ohio. We hope that Florida will issue a similar advisory opinion. The Ohio advisory opinion will be forwarded to The Florida Bar Standing Committee for UPL for its review and consideration. The chair of the Elder Law Section's UPL Special Committee is also preparing UPL CLE materials to be used at the upcoming AFELA Elder Concert. There is a consensus among the UPL committee members that increasing awareness among the public and Florida attorneys is one of the best ways to attempt to counteract the apparently growing problem of UPL among non-attorney Medicaid planners.

A primary goal of the UPL Special Committee is to increase and maintain awareness of the UPL problem, both among attorneys and the public. Since The Florida Bar's UPL investigative process is "complaint driven," it is critical for attorneys and their clients to be willing to file UPL complaints when alleged instances of UPL are encountered. Therefore, it is a primary goal of the committee to encourage and facilitate the filing of UPL complaints with The Florida Bar.

CORRECTION:

Elder Law Advocate article: 'Down Syndrome' now included under definition of 'developmental disability'

A correction needs to be made to the substantive article appearing on page 19 of the summer 2011 issue of *The Elder Law Advocate*. Specifically, "Down syndrome" has NOT been included under the definition of "developmental disability" under paragraph (9) of F.S. 393.063 [Definitions]. Since Down syndrome has not been added to the list of developmental disabilities, the use of a guardian advocate proceeding for persons having Down syndrome remains applicable only to those persons also having "retardation."

At the time of writing the article and before the actual enactment of the legislation, the language in HB 7109 appeared to include Down syndrome within the definition of "developmental disability" in the statute, opening the door to the use of guardian advocate proceedings. Once the legislative language was placed into the statute, Down syndrome gained its own definition under paragraph (13) of F.S. 393.063, as is the case for the other developmental disabilities, such as autism, Prader-Willi syndrome, cerebral palsy and so on. In addition, Down syndrome was specifically included with persons affected by developmental disability under F.S. 393.0661(3) for purposes of the HCBS waiver (the developmental disabilities and family and supported living waivers).

Yet, whether it was oversight or too narrow a focus for this legislation, Down syndrome was NOT included in the specific definition under paragraph (9), which defines the term "developmental disability." Consequently, since a guardian advocate process under 393.12 only covers those who are within the definition of "developmental disability" appearing in paragraph (9), a person with Down syndrome will NOT be covered under 393.12 unless the person with Down syndrome is suffering from "retardation" or one of the other "developmental disabilities" as defined in paragraph (9).

Emma Hemness, co-chair
on behalf of the Medicaid Committee

Committees keep you current on practice issues

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

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

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

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UPDATE:

Florida's Joint Public Policy Task Force for the Elderly and Disabled

by Randy C. Bryan, co-chair

The last couple of years have been a very busy time for the Joint Public Policy Task Force, and we thought it would be a good time to provide an update on our efforts. For those of you not familiar with the Joint Public Policy Task Force, we are made up of the leadership of the Elder Law Section and the Academy of Florida Elder Law Attorneys, along with four "at large" participants selected by the task force based on their specialized knowledge and demonstrated excellence, two co-chairs and four paid consultants (lobbyist, legislative advisor, public relations and administrative law litigation attorney) to advocate for issues affecting the elderly and the disabled.

This update will provide a brief summary of what we've accomplished, what we're currently working on and what we see on the horizon. Let's start with a summary of recent accomplishments.

- **Prospective implementation of the five-year look back period.** Following the Department of Children and Families' publication of a proposed rule that attempted to implement the five-year look-back period retroactive to November 2007, the task force intervened and successfully advocated for a prospective implementation to be effective for all transfers occurring on or after Jan. 1, 2010. As a result of these efforts, the five-year look back will not be fully implemented in Florida until January 2015.
- **Protect retirement accounts.** Following DCF's publication of a proposed rule seeking to extend the requirement to name the State as beneficiary of all retirement accounts, subjecting them to potential estate recovery, the task force intervened and DCF removed the language from the proposed rule because it was more restrictive than federal law.
- **Extend long-term care partnership policy protections to long-term care waiver programs.** When DCF initially implemented the long-term care partnership policy protections that provide a dollar for dollar asset disregard based on long-term care insurance benefits actually paid, the protections were only applied to those applying for nursing home/institutionalized care program benefits. The task force intervened and successfully lobbied to extend the asset disregard to waiver programs, including the ALE waiver and the LTC diversion program.
- **Defeat of spousal refusal and personal service contract legislation.** The 2011 legislative session was, from an elder law perspective, one of the busiest in many years. Among the bills introduced was legislation aimed to restrict, to the point of practical elimination, the use of spousal refusal and personal service contracts. Thanks to the concerted efforts of the task force's lobbyist, public relations expert and volunteers who spoke out against the legislation, the bill never came to a vote and died in session. We are also pleased to report that the legislation did not come back during the 2012 session.
- **Utility allowance increase.** After more than 10 years of using a standard utility allowance of $198 when calculating the community spouse income allowance, the task force successfully advocated for an increase to a $340 allowance, with annual updates.
- **Successful amicus curiae.** Immediately after taking office, Governor Scott issued Executive Order 11-01, which purported to suspend all administrative rulemaking, effectively freezing every state agency's ability to properly administer their programs. The task force joined with other organizations that challenged the governor's actions by filing an amicus, and the Florida Supreme Court eventually agreed that the governor had overstepped his authority.
- **Improper denials based on level of care.** Over the last couple of years, a large number of applications for Medicaid benefits have been denied solely because DCF did not receive a confirmation of the level of care from the Department of Elder Affairs CARES unit. This delay was not within the Medicaid applicant's control, but resulted in the improper denial of benefits nonetheless. After more than two years of advocacy efforts with DCF and DOEA, a new process requiring better communication between DCF and DOEA was implemented, and DCF published a new rule prohibiting the denial of an application based on failure to have all required documentation until 60 days after the initial application, an increase from the 30 days previously provided. We hope the combination of these efforts will eliminate improper denials based on failure to provide the level of care.
- **Use of DRA compliant promissory notes.** Following Florida's implementation of the Deficit Reduction Act, DCF policy continued to provide that a promissory note would be treated as a resource and not income. Because this was not in alignment with federal law, the task force engaged DCF, which led

to a change in policy recognizing that a DRA compliant promissory note should be treated as income and not a resource.

- **Penalty divisor.** After a more than two-year battle with DCF regarding the outdated penalty divisor, we are pleased to report that by the time this goes to press, we all should be enjoying the benefit of an increased penalty divisor of $6,880. In addition, we have received a verbal acknowledgement from DCF confirming the need to review and update the penalty divisor on an annual basis moving forward.

What we're working on currently, and what's on the horizon:

- **Medicaid reform legislation.** This is probably the single biggest issue that will impact our clients and our practices over the next several years as the State attempts to force almost all Medicaid recipients in to a managed care system run by for-profit insurance companies. When this is fully implemented, our clients may no longer have the freedom of choice they currently enjoy, and we may find many more people in the unfortunate position of being unable to afford Medicaid benefits. A full analysis and report of the Medicaid reform implementation is well beyond the scope of this update, but it was discussed at our fall 2011workshop for task force contributors.

  In summary, the Medicaid reform advocacy effort has three phases. The first phase concluded last year when, despite our advocacy/lobbying efforts with the Legislature, editorial boards, op-eds, etc., the Legislature passed and Governor Scott signed the initial Medicaid reform legislation. We are now in phase two of the advocacy efforts, which has involved an alignment and coordination with other organizations including Florida CHAIN, AARP, Florida Council on Aging, Alzheimer's Association, Florida Health Care Administration and others, as well as an unprecedented grass roots effort with ELS and AFELA members across the state attending public hearings as the Agency for Health Care Administration started the process of requesting a waiver from the Center for Medicare and Medicaid Services (CMS) to implement the waiver statewide. Phase two continues today as CMS is considering the waiver request and we continue to engage with AHCA and CMS to bring to light the numerous deficiencies with the State's plan. If necessary, phase three will consist of a potential legal challenge depending on what CMS does with the waiver request. If the waiver is ultimately implemented, we hope to hold another workshop for task force contributors to provide more details on the waiver's impact on our clients and our practices.
- **Proper treatment of income from VA.** For years now, DCF has failed to properly classify a Medicaid applicant's receipt of income from the Veterans Administration as a result of his or her unreimbursed medical expenses. We all have had clients whose receipt of non-service connected pension benefits with aid and attendance caused their income to be over the income cap, thus requiring a qualified income trust to obtain Medicaid eligibility, despite a restraining order imposed by a federal court and existing federal rules that preclude such classification as income. The task force continues to assist with administrative and court litigation efforts to require the State of Florida to properly classify these benefits and bring a halt to the improper denial of benefits.
- **Long-term care diversion program issues.** As the Medicaid reform train continues to steam down the track, the State's management and implementation of the long-term care diversion program has come into sharper focus. We are working closely with DOEA to better understand the operation of the transition program from nursing home to assisted living facility under the long-term care diversion program, we are working closely with DOEA on the use of the choice in counseling form—especially when the applicant is represented by an attorney—and we are trying to obtain clarity regarding how the State has implemented the diversion program to be certain the rulemaking process is being followed to ensure transparency with regard to the wait list, crisis placement, share of cost calculations and other aspects of the diversion program.

We hope this update provides the membership at large with a better idea of what we've been working on and where our efforts will be focused over the next year. The task force was formed over seven years ago to help form relationships with the administrative agencies and to advocate for issues affecting our clients. Our vigilance has never been more important. Although your volunteer participants on the task force will continue their efforts, it is critically important that we have the financial resources to employ the expertise that will be required over the next year as we move forward with the Medicaid reform implementation. If you are a current contributor, we thank you very much for your support. If you are not a current contributor, but would like to help, please visit the AFELA website at *www.afela.org* and scroll down to the bottom of the page, where you will find a link to the contribution form under "Support the Public Policy Task Force." Now more than ever, we need everyone's support!

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

4th DCA affirms a finding of undue influence as a reason to invalidate advance directives

by Ellen S. Morris

Does the trial court have subject matter jurisdiction to decide that a power of attorney document and/or a designation of health care surrogate document were procured by undue influence and thus invalid? That was the question on appeal in my recent guardianship case. The answer from the 4th DCA is YES.

Here are the facts of the case. The son and the granddaughter of a woman in her late 90s engaged an attorney to draft and execute documents, including a durable power of attorney, a designation of health care surrogate and a codicil to her will exercising a power of appointment she had in her late husband's trust estate. The attorney was not known to the son's mother, and the mother did in fact have a long-standing estate planning attorney. The mother was residing in an assisted living facility and was previously diagnosed with dementia. On the same day that the advance directive documents were signed, the mother's physician entered a note in her chart that the mother lacked capacity to consent to treatment and to manage her affairs. Luckily for the mother and the other interested family parties, the son and the granddaughter videotaped the signing appointments when the mother signed the advance directives and the codicil the next day. The trial judge viewed the videotapes of the signing appointments, which depicted the mother reading from a statement and looking to others in the room to answer questions that were posed to her by her new attorney. The son and/or granddaughter were present at the signings, and the son paid for the attorney's services. The son and the granddaughter benefited from the codicil financially. Additional testimony revealed that the facility and the long-standing estate planning attorney were previously instructed by both the mother and her husband that the son was never to get any information about their estate or their health care and he was never to make any decisions on their behalf.

After the son obtained his power of attorney and designation of surrogate, the daughter brought a guardianship action. In our petition we alleged that the documents were invalid due to the son's undue influence and that the designation of health care surrogate was invalid pursuant to F.S. 765.105(1) and (3). Subsection (1) was easy since the mother made spontaneous statements throughout the three-day trial that she only wanted her daughter to take care of her and make decisions for her. Subsection (3) states that the designation may be invalid if "the surrogate or proxy was improperly designated or appointed … ." We stated in our petition and in argument in trial and on appeal that the son was improperly designated or appointed because there was fraud in the inducement and he used undue influence to be appointed. The trial court agreed with us and included the following language in an order for appointment of guardian and in the letters I drafted:

> After consideration of reasonable alternatives to guardianship, viewing the video tape of the signing of certain advance directives and hearing testimony of witnesses, the Court finds that the advance directives executed by the ward on November 23, 2009, are the product of undue influence and are thus invalid …

Appellate counsel in their appeal argued two points. First, they argued that F.S. 765.105 (3) is limited only to the mechanics of execution requirements of a designation of health care surrogate document. Second, they argued that even if the court had subject matter jurisdiction to find the designation of health care surrogate document to be invalid pursuant to sub-paragraph (3) of 765.105, the court exceeded its authority when it found the power of attorney to be invalid since the statute doesn't allow for the court to find a reason for invalidating a power of attorney, only to invalidate it. The appellate attorney argued that F.S. 744.331(6)(f), in strict interpretation, only allows the judge to determine that the power of attorney is not an alternative and not to state a reason why.

My argument countered theirs with the *Graham* (970 So. 2d 438 (Fla. 4th DCA 2207) and *Smith* (821 So. 2d 1197 (Fla. 4th DCA 2002) cases, in which the 4th DCA remanded cases for the trial judge to make specific findings regarding why the advance directives were invalid. I also argued that F.S. 744.331(6)(f) required the interested person to state a good faith belief that the power of attorney is invalid and to state a reasonable factual basis for that belief. The trier of fact is the only one who has authority to determine whether the belief is in good faith and whether the objector has stated a reasonable factual basis. In making that analysis, the court must look to the underlying factual basis and find whether it is valid. In this case the underlying factual basis was the existence of undue influence, which was proven with overwhelming evidence. I further argued that although our new power of attorney statute was not yet in existence at the time of this trial, it gave the court power to construe a power of attorney that was executed prior to October 2012 and therefore ratified the trial judge's construction in this case.

The 4th DCA agreed with my arguments and affirmed the lower court's finding and orders with a per curium affirmed opinion. I wish the court had entered a written opinion and elaborated on the need for undue influence to be considered in the court's determination. But the lower court's order in this case is very clear, and the 4th DCA's affirm should pave the way for undue influence to be a factor to invalidate advance directives and so protect our vulnerable adults.

Submitted on behalf of the Guardianship Committee

Tax tips for elder lawyers

Remember the basic gift tax rules

Recently a client and his broker contacted me about gifting approximately $1 million of highly appreciated stock to the client's grandchildren. I reminded the client of our prior conversations regarding various grantor retained income/annuity trusts (GRITS, GRATS) and other estate planning techniques, some of which we had already implemented. The client still wanted to make the outright gift. Upon further questioning of the client and the broker, I found that some of the gifts were to be made to trusts that were already established by the parent of some of the grandchildren. I also knew that the shares of stock to be gifted were acquired at different and increasing costs. This led to a discussion of some of the most basic gift tax rules.

The current $13,000 gift tax exemption amount is total, per calendar year per recipient. If the gifter is married (I am assuming both the gifter and spouse are U.S. citizens), one spouse can give up to $26,000, with a timely filed gift tax return (Form 709A) signed by both spouses. (Note that the annual exclusion amount, which is now indexed for inflation, remains at $13,000 for 2012). Most know and remember this rule, but:

The gift must be of a present interest. Therefore, for gifts to trusts that do not have a right of a trust beneficiary to withdraw payments from the trust when contributed (commonly referred to as a "Crummey power"), the annual gifting exemption does not apply.

The expiration of the Crummey withdrawal right can create a gift, in some cases, to other beneficiaries that is also not a present interest gift to the other beneficiaries. Assume, for example, there is an irrevocable pooled trust for two grandchildren and the grandparent gifts $13,000 to each grandchild via the irrevocable trust. The trust has Crummey provisions that are not exercised by either grandchild. Upon the lapse of each grandchild's Crummey right to withdrawal, half of each $13,000 gift is effectively credited to the other grandchild—resulting in a *non* present interest gift by each grandchild to the other grandchild. There are, of course, ways to draft around this issue, but in the example above, the trust is already in place.

The generation skipping tax is also impacted by these multi-generational gifts that do not qualify for the annual gift tax exclusion.

Michael A. Lampert

So, in the example above, we have to review the terms of the recipient grandchild's trust to see if the gift by the grandparent client can be made to be a present interest gift to the grandchild, and if so, if the lapse of a Crummey withdrawal right would create a non present interest gift from that grandchild to another grandchild.

In addition, IRC §1015 provides that the recipient of a gift receive the same basis as that of the gift giver. If the gift of the appreciated stock was not made until after the death of the gifter, the recipient would generally receive the asset, stock in this case, with a basis equal to the fair market value of the asset at the gifter's death. In the example above, the client believes it is still advisable to make the gift because he believes the stock will increase considerably in value, saving significant estate tax at the client's death. However, the broker was directed to gift the stock with the highest basis and to make sure careful records are kept of exactly which shares were gifted and at what basis. This simple step could save the grandchildren significant income tax in the future upon the stock's sale.

When doing estate and gift planning, whether for tax, Medicaid or other purposes, don't forget the basics.

The IRS has been implementing its e-file program

For tax year 2011, paid preparers who reasonably expect to file 100 or more individual, estate or trust income tax returns are required to e-file. In 2012, the e-file requirement will apply to paid preparers who reasonably expect to file more than 10 of these returns. According to a new Government Accountability Office report (GAO-12-33), the e-file rate for return preparers increased in calendar year 2011 to about 89 percent, which was up 11 percentage points over 2010's rate. Although the e-file mandate did not apply to individual taxpayers who self-prepared their returns using commercial tax software, their e-file rate increased to about 71 percent, which equaled a 7 percentage point increase over the previous year's rate. Preparers who were new to e-file said they experienced increased costs and administrative burdens as a result of the mandate. Other preparers who had previously e-filed returns told the GAO that the mandate had little effect on their practices.

While most lawyers do not prepare income tax returns, some who do not prepare individual income tax returns do file estate and/or trust income tax returns. Unless the rule changes, or its implementation is delayed, income tax return preparing attorneys who expect to prepare 10 or more *total* income tax returns will need to e-file. Be ready, perhaps even e-filing 2011 returns for "practice."

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The survivors got a million-dollar wrongful death settlement, and now creditors of the estate want to know why they will not get paid

What every probate attorney should know about Florida's wrongful death statute

Tips & Tales

Kara Evans

The tale

The client was killed in an accident. The car he was driving was uninsured, and he owed over $15,000 on the note. There were no medical bills because he was killed instantly, but he had other debts such as past due phone bills, back rent, etc. He was unemployed at the time of death and had no savings or other assets. His family members wanted to bring a wrongful death action against the other driver. They were told they must open an estate and have a personal representative appointed to bring the action. The family was concerned that all the funds from the wrongful death action would go to the estate and end up in the creditors' hands.

The tip

The Florida Wrongful Death Act is covered under F.S. 768.16 - 768.26. It is important for every probate attorney to be aware of this statute and how it affects the probate estate. The public policy behind the statute is to shift the losses that result when a wrongful death occurs from the survivors of the decedent to the wrongdoer. And while F.S. 768.21 (7) states that "All awards for the decedent's estate are subject to the claims of creditors who have complied with the requirements of probate law"… it is crucial to understand exactly what the award for the decedent's estate consists of.

Section 768.20 requires that "The action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate." So, a personal representative must be appointed, and there are two categories of damages that can be recovered. Damages recoverable by the survivors are set out in F.S. 768.21(1) through (6) and include loss of past and future support and services. Spouses may recover for loss of companionship and protection and for mental pain and suffering. Children may recover for lost parental companionship, instruction and guidance and for mental pain and suffering from the date of the injury. Even parents of a deceased child may recover for mental pain and suffering from the date of the injury, and medical and funeral expenses due to the death may be recoverable to a survivor who has paid the expenses.

And the estate? The estate is entitled to 1) lost earnings, which are earnings of the deceased from the date of the injury to the date of the death (reduced by support that would have been paid to a survivor during that period); 2) lost accumulations, which are the prospective net accumulations of an estate that might reasonably been expected but for the wrongful death, reduced to present value; and 3) medical and funeral expenses due to the decedent's death that have become a charge against the estate or that were paid by or on behalf of the decedent. Of course, attorney's fees and expenses of litigation are deducted proportionately from the awards allocated to the survivors and the estate.

If the case proceeds to trial, the jury will allocate damages between the estate and each survivor. If there is to be a settlement, the statute only requires court approval of a settlement that is objected to by any survivor or that affects a survivor who is a minor or an incompetent. However, some probate judges require court approval of any settlement, and it would certainly be a good practice tip to seek court approval of all settlements and proposed distributions. It is also interesting to note that for purposes of Florida's wrongful death statute, "minor children" means children under 25 years of age, notwithstanding the age of majority.

So, what happens to the creditors in our example? Except for attorney's fees and funeral expenses, this estate could expect very little. The family's concerns regarding the creditors getting all the funds are unfounded, and the survivors receive their awards. As stated by the court in *In re Estate of Barton*, 631 So.2d 315 (Fla. 2d DCA 1994), "... proceeds from a wrongful death action are not for the benefit of the estate, they are thus not subject to estate claims. They are the property of the survivors and are compensation for their loss, separate from the decedent's loss."

Summary of selected caselaw

by Diane Zuckerman

Contract to make will/ motion to dismiss

Elliot Shapiro, Appellant, v. Lionel Tulin, as Personal Representative of the Estate of Rocco DeStefano, Appellee, 60 So. 3d. 1166 (2011)

This case involved a written contract to make a will between the appellant and the decedent, Rocco DeStefano. The contract stated that if DeStefano died first, the appellant would receive specified jewelry. If the appellant Schapiro died first, DeStefano would receive $100,000. The contract also stated that if either party failed to perform under the contract, the non-defaulting party would be a secured creditor in a claim against the estate.

DeStefano died first, and Schapiro presented the claim for the jewelry to Tulin, the personal representative of the estate. Tulin filed an objection to the claim and failed to deliver the specified jewelry. The appellant then filed a complaint, raising three causes of action: replevin, breach of contract and breach of fiduciary duty. In response, Tulin filed a motion to dismiss the complaint, alleging illegal gambling, barring breach of fiduciary duty claim under F.S. 732.515, and failure to state a cause of action because the agreement did not comply with F.S. 732.701. The trial court granted Tulin's motion to dismiss on the grounds that the written contract did not comply with F.S. 732.701. The trial court found that the written contract was invalid because it lacked the signatures of two attesting witnesses and granted the motion to dismiss with prejudice. Schapiro appealed.

The Fourth DCA cited several cases for the proposition that when granting a motion to dismiss, a court may not go beyond the four corners of the complaint and must accept the asserted facts as true.

The issue was whether the trial court erred in granting Tulin's motion to dismiss with prejudice because it found that the two attesting witnesses did not sign the agreement. The Fourth DCA noted that the complaint alleged that all conditions precedent (i.e., the requirement for two attesting witnesses) were either met, excused or waived. Accordingly, the trial court was bound to accept these assertions in the complaint.

The Fourth DCA agreed with the appellant and reversed the dismissal of the complaint. Further, the court stated that the appellant should have been given the opportunity to amend the complaint to cure any alleged defects, as a matter of course.

This case is useful for parties arguing against a motion to dismiss, and it reinforces the well-settled law regarding the standard for the courts in addressing these motions.

Devise of homestead

James Aronson et al., Appellants, v. Doreen Aronson, Appellee, Case No: 3D09-773, Opinion Filed February 1, 2012

This opinion of the Third District came upon consideration of the appellant's motion for rehearing, and substituted its prior opinion issued Oct. 27, 2010.

The decedent, Hillard J. Aronson, while living in Massachusetts with his wife, conveyed a condominium in Key Biscayne to himself, as trustee, to his living revocable trust. The Massachusetts property was owned solely by his wife. Prior to Mr. Aronson's death, the couple moved to the Key Biscayne condominium in Florida. Mrs. Aronson applied $129,895 of the proceeds from the sale of the Massachusetts home to satisfy the mortgage on the condominium.

Prior to his death, Mr. Aronson individually executed a quit claim deed to his wife. When Mr. Aronson died in 2001, the condominium was the only property in the trust. The trust document provided for life interest to Mrs. Aronson, and upon her death, the remaining property was to be distributed to Mr. Aronson's two sons from a prior marriage. The two sons were named as successor trustees. In a prior lawsuit, Mrs. Aronson argued that she should receive the entire fee simple by virtue of the quit claim deed. She lost on the grounds that the quit claim deed was invalid because the property was owned by the trust rather than by Mr. Aronson individually.

Another provision of the trust provided that Mrs. Aronson had a right to withdraw principal from the trust in an amount not exceeding the greater of $5,000 or 5 percent of the market value of the principal. After losing the first case, Mrs. Aronson began making annual demands to the trustees under this clause. She also demanded that the trust reimburse her in the amount of the mortgage payoff amount and for taxes, special assessments and other expenses of the condominium, arguing that because the trust owned the property, it was responsible for these expenses. This resulted in another lawsuit. The trustees argued they were entitled to sell the condominium to pay the expenses. In the amended complaint, Mrs. Aronson sought a declaratory judgment that the property was protected homestead and not subject to sale by the successor trustees. The trial court ordered the trustees to reimburse Mrs. Aronson the amount of the mortgage payoff, an additional sum for condominium improvements and repairs and a 5 percent interest in the Key Biscayne condominium for each year she had requested a distribution from the principal. The trustees appealed.

The Third District reversed the trial court, finding that it was indisputable that the condominium was the decedent's homestead at the time of his death. The court cited F.S. 732.401 as follows:

> If not devised as authorized by law and the Constitution, the homestead shall descend in the same manner as other intestate property; but if any decedent is survived by spouse and one or more descendents, the surviving spouse shall take a life estate in the homestead, the vested remainder to the descendents in being at the time of the decedent's death.

The Third District reasoned that because the Key Biscayne condominium was the decedent's homestead, and because he was survived by his wife, the condominium was not subject to disposition through the trust. The court noted that the moment of Mr. Aronson's death, the homestead property passed outside of probate to his wife for life, and thereafter to the surviving sons, per stirpes. Therefore, the trustees had no power or authority with respect to the condominium. The Third District found that the widow was responsible for the expenses of the property as long as she remained a life tenant. The court also held that there was no legal basis to charge the remaindermen with the obligation to reimburse the widow for expenses or the amount she paid to satisfy the mortgage.

This case stands for the proposition that when there is a conflict between the statutory and constitutional provisions regarding homestead and a trust agreement, the statute prevails. The trial court had no authority to broaden the homestead protection.

Elective share/discovery

Sandra Gill McDonald, Petitioner, v. Wiley Johnson and James Randy Johnson, as successor Co-Trustees of the Paul D. McDonald Revocable Trust Agreement dated April 19, 1991, as amended, et al., Case 2D11-3200 January 27, 2012

Sandra Gill McDonald, the surviving spouse of decedent Paul D. McDonald, filed a petition for writ of certiorari to quash a discovery order issued in the probate court. Sandra McDonald sought a subpoena of documents from the decedent's business, MacDonald Construction Corporation (MCC), a nonparty in the probate action. She argued that the documents were relevant to help her decide whether to take an elective share. The opposing party objected and the probate court sustained the objection, ruling that the MCC stock was not part of the probate estate and that the value of the stock was excluded in the calculation of the elective share calculation pursuant to F.S. 731.2155(6). The Second DCA quashed the probate court's order.

To obtain certiorari relief, a petitioner must establish that the order is a departure from the essential requirements of the law, resulting in a material injury that cannot be corrected on appeal. The Second DCA found that this was one of the rare cases in which certiorari review was appropriate. The court relied on F.S. 732.2155(6), providing:

> Sections 732.201-732.2155 do not affect any interest in property held, as of the decedent's death, in a trust, whether revocable or irrevocable, if:
>
> The property was an asset of the trust at all times between October 1, 1999, and the date of the decedent's death;
>
> The decedent was not married to the decedent' surviving spouse when the property was transferred to the trust; and
>
> The property was a non-marital asset as defined in s. 61.075 immediately prior to the decedent's death.

There was no dispute between the parties that only section (c) applied to the case. The district court noted that the definition of marital assets included an enhancement in value and appreciation of non-marital assets during the marriage or from the contribution from marital assets. Therefore, if the value of the MCC stock increased during the marriage, the increase would be part of the elective share value.

On these grounds, the surviving spouse's petition for writ of certiorari was granted, and the court quashed the probate court's order sustaining objections to the discovery.

As a take home message, to assist the client in making the most prudent decision, the practitioner should be aware of all assets that are calculated to determine elective share.

Simultaneous death statute/ vested interest in trust

Andrew Darian, as Personal Representative of the Estate of James E. Hughes, Deceased, and as Successor Trustee under the James F. Hughes Living Trust dated August 17, 2000, Appellant v. Elizabeth Ann Weymouth, as Personal Representative of the Estate of Martha Mayfield Hughes, Deceased, et al.

Prior to their marriage, the decedents, James E. Hughes and Martha Mayfield, entered into a prenuptial agreement. After the marriage, Mr. Hughes created the James E. Hughes Living Trust (hereinafter referred to as the trust) in compliance with the prenuptial agreement. The trust provided that that if Mr. Hughes were to predecease his wife, she would inherit a home in Florida and a home in North Carolina, with their contents, and the sum of $1 million. The trust did not address disposition of property if Mrs. Hughes were to predecease her husband.

On Sept. 3, 2004, both James and Martha Hughes were shot and killed by Mrs. Hughes' adopted son from another marriage. The coroner could not determine who died first.

The probate court deemed their deaths to be simultaneous and applied F.S. 732.601(1), ordering that Mr. Hughes' property was to be disposed of as if he survived Mrs. Hughes.

Andrew Darian, the son of Mr. Hughes, filed a complaint for construction of trust instrument and determination of beneficial interests under trust. Elizabeth Weymouth, daughter of Mrs. Hughes, filed an

continued, next page

answer and counterclaim seeking to enforce the provisions of both the prenuptial agreement and the trust. Both parties filed motions for summary judgment.

Weymouth argued that her mother's interest in the trust became vested upon the creation of the trust. Darian argued that Mrs. Hughes' interest was contingent upon her surviving Mr. Hughes, and that the interest lapsed when she predeceased him.

The probate court determined that Mrs. Hughes' interest vested prior to her husband's death and awarded the property to Mrs. Hughes' estate.

The Fourth DCA noted that the case was governed by common law and not the anti-lapse statute applying to the trusts that became irrevocable on or after July 1, 2009. Mr. Hughes' trust became irrevocable upon his death in 2004.

In reversing the probate court, the Fourth DCA cited *Travis et. al. v. Ashton et al.*, 23 So. 2d. 725 (Fla. 1945), holding that the beneficiary of the trust did not vest at the time of the trust's creation and that the interest is suspended during the grantor's lifetime. Rather, the interest is contingent on the death of the grantor.

Because it had been judicially determined that Mrs. Hughes predeceased her husband, her interest in the trust lapsed once her husband died.

The lesson to be learned from this case is that if the disposition of property for survival of beneficiaries is clearly delineated in the will or trust, costly litigation can be avoided.

Standing/professional ethics

Jon Agee and Susan Agee, Appellants, v. Roger L. Brown, as Personal Representative of the Estate of Herbert G. Birck and as the Trustee of the Herbert G. Birck Revocable Trust, Appellee, 73 So. 3d. 882 (4th DCA 2011)

The trial court dismissed appellants Jon and Susan Agee's petition to revoke probate of the last will of Herbert G. Birck, finding that their standing was void because it was contrary to public policy.

After Birck died, Roger L. Brown filed a petition for administration and sought to have the decedent's will, executed Feb. 11, 2009, admitted to probate. The trial court granted the petition and appointed Brown as personal representative.

In April 2010, the Agees filed a petition to revoke the 2009 will, alleging there was undue influence by the beneficiaries, in both the procurement of the will and the decedent's living trust executed in 2009. They sought instead to have a prior 2007 will admitted to probate, in which they were named as the beneficiaries of the estate. They also argued that Birck lacked testamentary capacity when the 2009 instruments were signed. In response, Brown asserted that the Agees should be denied standing on public policy grounds because Jon Agee had drafted the will. Brown argued that it was a violation of the Rules Regulating The Florida Bar to prepare a will that names the drafting attorney as a beneficiary, if the testator and the beneficiary are not related. The Agees asserted they had been personal friends of Birck for 16 years before he died.

Following a hearing on the petition to revoke the 2009 will, the trial court dismissed the Agees' petition and entered a final order, which stated:

> The Court finds the (Agees) were not related to Herbert G. Birck, and since Jon Agee was the attorney who acted as the scrivener of earlier will, trust, and deed in which he and his wife, Susan Agee, were left a bequest of property, the bequest to (the Agees) as contestants was void as contrary to public policy of the State of Florida and Rules Regulating (The) Florida Bar. (The Agees) do not have standing to contest the later will, trust, and deed in which (they) were left nothing.

The rule at issue was Rules Regulating the Florida Bar 4-1.8(c), stating:

> A lawyer shall not … prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client.

The Agees appealed and the Fourth DCA reviewed the dismissal based on a lack of standing de novo. The court relied primarily on F.S. 733.109(1), which provided:

> … any interested person, including a beneficiary under a prior will, unless barred under s. 733.212 or s. 733.3123 may commence (a proceeding to revoke the probate of a will) before final discharge of the personal representative.

Further, referring to the definition of "interested person," this means a person who may be reasonably expected to be affected by the outcome of the particular proceeding involved.

The district court noted that neither of the above cited statutes had exceptions that would prohibit an attorney who drafts a will from being an "interested person." The court ruled that the trial court had improperly incorporated Rule 4-1.8(c) of the Rules Regulating The Florida Bar into the probate statute. The court reasoned that the rules of statutory construction do not allow courts to add words that were not placed by the Legislature. Further, under the 2007 will, Jon Agee was nominated as personal representative and thus had standing as an interested person. The Fourth DCA reversed and remanded the motion to dismiss.

The court did not ignore the possible defenses that could ultimately be raised, citing F.S. 732.5165, stating in relevant part "that a will is void if the execution is procured by fraud, duress, mistake, or undue influence." The court held that the fact that Jon Agee had drafted the will did not make the deed void per se, but instead raised a rebuttable presumption of undue influence, citing *Fogel v. Swann*, 523 So. 2d. 1227 (3rd DCA 1988).

The obvious take home message is that the best practice is to adhere to the rules of professional conduct. The law regarding standing, however, continues to depend on whether the party is an "interested person" as defined in the probate code.

Fair Hearings Reported

by Katrina M. Thomas

***Petitioner v. Respondent,* Appeal No. 09N-00088 (August 7, 2009).**

The petitioner suffers from Alzheimer's type disorders and requires nursing care. He has received nursing and psychiatric medical treatment at the facility since August 2008. Since the beginning of 2009, the petitioner has demonstrated repeated episodes of combative behavior, including attempts at hitting staff members, kicking staff members and assaulting other residents. On May 7, 2009, the petitioner pushed a caregiver down, and she was taken to the hospital.

On May 8, 2009, the respondent facility issued a notice of intent to discharge to the petitioner effective June 8, 2009, which was signed by a physician. The reason provided for the intent to discharge was that the safety of other individuals in the facility was being endangered, and the notice proposed that the petitioner would be discharged to another nursing facility in Florida.

The petitioner's family was familiar with the proposed transfer facility and believed it was unsatisfactory. The family members hoped to locate a smaller facility closer to them and requested more time to make more suitable arrangements.

Pursuant to 42 CFR s. 483.12, a facility must permit each resident to remain at the facility unless the safety of individuals in the facility is endangered or the health of individuals is endangered. In advance of a discharge or a transfer from a facility, the facility must notify the resident of the discharge and reasons thereof and record the reasons in the resident's clinical record. The notice is required to be given at least 30 days before the proposed transfer; however, notice may be given as soon as practicable before transfer or discharge when the safety of individuals in the facility is endangered.

Based on the evidence presented, the hearing officer determined that the safety of others in the facility had been endangered, and the appeal was accordingly denied.

***Petitioner v. Respondent,* Appeal No. 09N-00166 (January 14, 2010).**

At issue is whether or not the action by the facility to discharge the petitioner on the basis that the facility could not meet the needs of the petitioner is correct. The facility has the burden of proof to establish by clear and convincing evidence that the discharge is appropriate under 42 CFR 483.12.

The petitioner is a quadriplegic and requires total care. At the end of July 2009, a small amount of marijuana was confiscated from the petitioner's room. A police report was filed, but the charges resulting from the police report against the petitioner were dismissed by the state attorney's office. The respondent facility, on Oct. 1, 2009, notified the petitioner of its intent to discharge him, effective Nov. 1, 2009, because the petitioner's needs could not be met by the facility. The explanation for discharge stated that the possession of marijuana could not be tolerated and the narcotic presented a danger to the petitioner and others.

Federal regulations allow a Medicaid or Medicare certified nursing facility to discharge a patient if the patient's needs can no longer be met at the facility or if the safety of other individuals at the facility is being endangered. The notice of discharge indicated that the reason for the discharge was that the petitioner's needs could not be met at the facility. Testimony showed that the facility had been able to care for the petitioner and that the services required had been provided. The hearing officer found no evidence that the facility could no longer meet the petitioner's needs. Further, there was no evidence presented that showed how the petitioner's behavior had endangered other individuals in the facility. The respondent's burden of proof was not met, and the hearing officer determined the respondent's action to discharge the petitioner was not justified. Appeal granted.

***Petitioner v. Respondent,* Appeal No. 09F-04007 (September 4, 2009).**

The petitioner applied for Institutional Care Program (ICP) coverage several times in 2008 and again in January 2009. The applications were denied based on eligibility for all the requested months in 2008. The respondent, Florida Department of Children and Families, determined the asset value between March and December 2008 was above $2,000 at all times.

The petitioner's niece, who had submitted the applications, was not aware of the Manulife stock owned by the petitioner until October 2008. For the time between March and December 2008, the lowest value of the stock was $2,336.80. In January 2009, the stock was sold and the resource was used. Accordingly, the respondent authorized ICP beginning in January 2009 because the petitioner's assets were then lower than the $2,000 standard for ICP coverage. The petitioner's niece requested a method of mitigation for the 2008 months due to the circumstances of being unaware of the asset.

"Resources" is defined in 20 CFR s. 416.1201(a) as "cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could covert to cash to be used for his or her support and maintenance." Section 416.1205(c)

continued, next page

establishes the "limitations on resources" standard at $2,000 for an individual. At all times applicable to the appeal at hand, the petitioner's assets exceeded the $2,000 limit for an individual. The hearing officer denied the appeal, and the respondent's action was affirmed.

***Petitioners v. Respondent,* Appeal No. 09F-07168 and 09F-07169 (January 6, 2010).**

At issue are the Agency for Health Care Administration's (AHCA) actions of Oct. 15, 2009, to deny the petitioner's request for Home Health Aid (HHA) services from July 8, 2009, through Jan. 3, 2010. AHCA denied the request based on its determination that the medical care sought was not medically necessary.

The petitioners are 5 and 6 years old and were diagnosed with bilateral deafness since birth. Both children received a cochlear implant in May 2004. Their mother is the sole provider and works from 6 a.m. to 9 p.m. on the weekends and from 3 to 11 p.m. during the work week.

In July 2009, Maxim Healthcare Services, the provider, submitted a request on behalf of the petitioners for 1,750 hours of HHA hours, from 2:30 to 11:30 p.m. during the work week and from 7 a.m. to 7:30 p.m. on the weekends for the period of July 8, 2009, through Jan. 3, 2010. Although the request was initially approved, it was later denied upon a reconsideration review. On Oct. 15, 2009, notice was sent to the petitioner denying all requested HHA hours based on the determination that the medical care requested was not medically necessary.

Florida Administrative Code 59G-1.010 states in part:

> (166) "Medically necessary" or "medical necessity" means that the medical or allied care, goods, or services furnished or ordered must:
>
> (a) Meet the following conditions:
>
> 1. Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain;
>
> 2. Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs;
>
> 3. Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational;
>
> 4. Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available, statewide;
>
> 5. Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider.

The Home Health Services Coverage and Limitations Handbook provides that personal care services must be documented as medically necessary. Based on the evidence presented, the services were found not to be medically necessary, the appeal was denied and the denial of HHA services was affirmed.

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