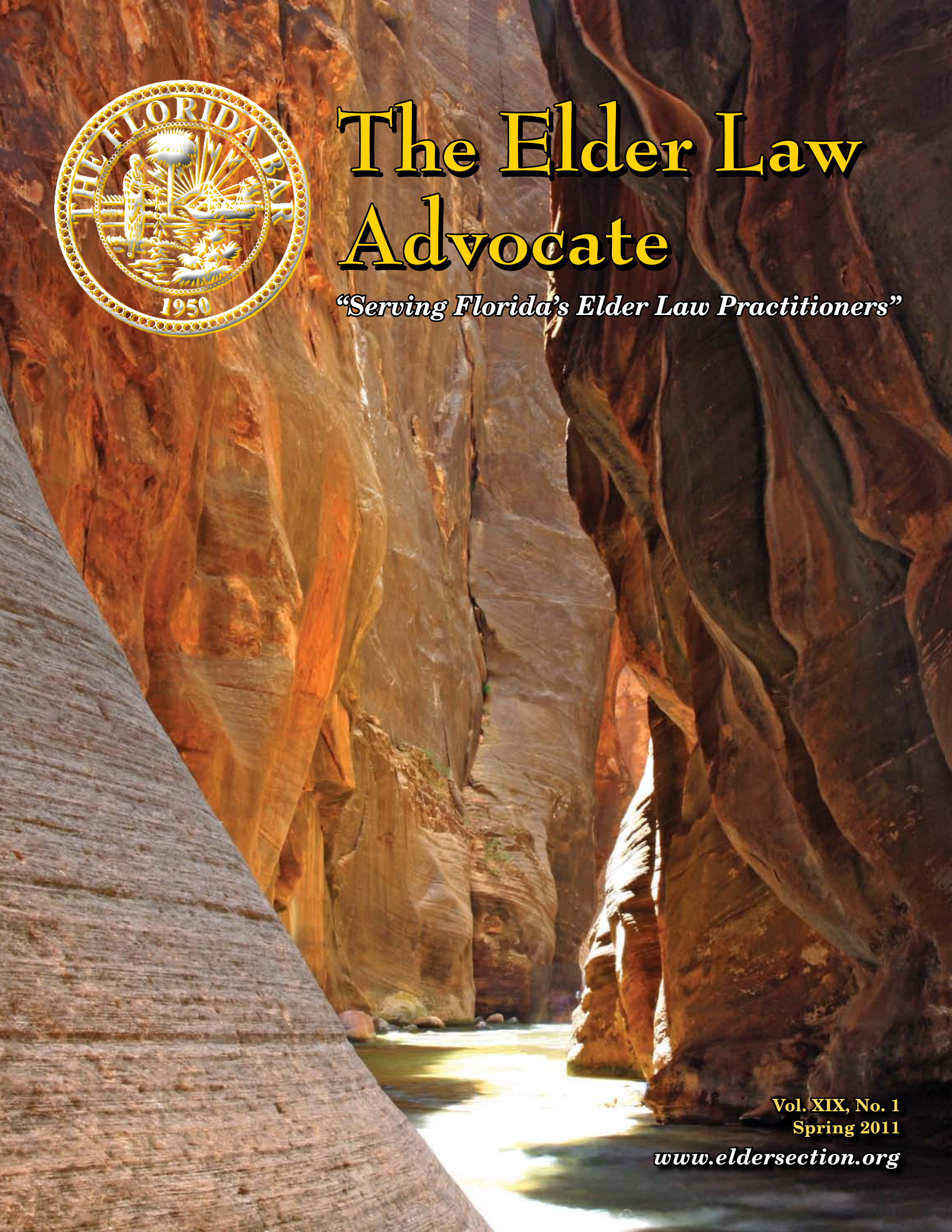

The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

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The Elder Law Advocate

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COVER ART

"Zion National Park Narrows" by Randy Traynor, Advertising Director, The Florida Bar *Journal & News*

Contents:

The deadline for the SUMMER ISSUE is July 1, 2011. 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.

Extraordinary people

Leonard E. Mondschein

Message from the chair

As I am sure most past chairs would agree, the year goes by very quickly when you are leading the Elder Law Section. There are Executive Committee meetings to prepare for each month, as well as Executive Council meetings to preside over. Then there are CLE courses to keep on track and various committee and Florida Bar telephone meetings to attend, in addition to preparing for special events such as the section's annual retreat and The Florida Bar's annual meeting. Oh, and, did I mention, we still need to keep practicing law!

Sometimes we get so busy as chairs that we fail to adequately acknowledge the extraordinary work and personal sacrifice in time and money our members are making throughout the year for the benefit of our section, our practices and, ultimately, our clients.

Rather than wait until the annual meeting in June to recognize the contributions of some of our members, I want to use this opportunity to acknowledge some of their accomplishments.

In January, Enrique Zamora served as chair of the annual Certification Review course for two days in Orlando. The attendance of almost 90 registrants was the largest in many years. When you look at the array of speakers brought in by Enrique, you will know why. As always, it was a great program to help prepare for the board certification exam in elder law and also an opportunity to learn what is "cutting edge" in the most important areas of elder law. My personal favorite was watching Jill Burzynski teach "Financial Products for the Elderly," using Power Point to better focus on the important aspects of each financial product. Thank you, Enrique and Jill.

One of the section's continuing problems has been the management company's lack of acceptable accounting practices regarding the Public Policy Task Force's contributions by section members. In an effort to solve this problem, John Clardy, the section's secretary, with the help of Beth Prather, AFELA president, secured all fund-raising records for past years, developed an up-to-date list of contributors and conducted a complete audit to ensure that all our contributions have been received and accounted for. John has now set up a system that will give us instant access to all information required to manage task force contributions for all future fund-raising. As an ancillary benefit, John's extraordinary efforts will save the task force $5,000 in administrative fees. Thank you, John and Beth.

At the Executive Council meeting in January, the council voted to reduce funding for the task force for next year to help balance the budget. Although this was a difficult decision, we are hopeful that members' contributions, administrative cost savings and increased section revenue will ultimately resolve this year's budget problem. In an effort to solve this dilemma as soon as possible and restore the original funding of the Public Policy Task Force, an ad hoc budget committee was formed to recommend future cost cutting and to identify unnecessary spending. Emma Hemness, a past chair of the Elder Law Section, volunteered to lead this ad hoc committee, and she has already submitted a report that will be considered by our Budget Committee, chaired by Robert Morgan, treasurer of the section. Thank you, Emma and Robert.

While we were all engaged in working on next year's budget, as well as maintaining adequate funding for the Public Policy Task Force, an extraordinary thing happened. The Guardian Pooled Trust, one of our Gold Sponsors, made an unsolicited and unprecedented contribution of $25,000 to the Public Policy Task Force. When I called Travis Finchum, one of the principals of The Guardian Pooled Trust, to thank him and The Guardian Pooled Trust for their most generous contribution, he said with all humility, "I heard you needed the money." Thank you, The Guardian Pooled Trust.

In keeping with the Elder Law Section's continuing effort to support developing areas of practice in the field of elder law, the Executive Council voted to make the Veterans' Rights Committee a permanent committee of the section, recognizing the dedication of our members to those who have sacrificed their health and safety for our country. Leading this effort to create a permanent committee was Jack Rosenkranz, who devotes a substantial part of his practice to representing the rights of veterans. The Elder Law Section recognizes Jack for his persistence and dedication in making this committee a reality and for his advocacy for those who have served our country. Thank you, Jack.

As *The Advocate* is about to go to press, dark clouds are forming on the horizon in the form of legislation recently filed in the Florida Legislature regarding Medicaid reform. Among other things, this proposed legislation would limit the constitutional right to contract between a Medicaid recipient and a family member to render valuable services for financial consideration. It is well known by elder law attorneys that family members compose the largest group of caregivers in this country, and their sacrifice in lost time and wages requires fair compensation for services rendered to their elders. John Clardy and Emma

continued, next page

Message from the chair
from preceding page

Hemness, as co-chairs of the Medicaid Committee, have answered the call by assembling a group of Elder Law Section members to study the proposed legislation and work to educate the Legislature and the public about the harm this proposed legislation will do. If you support the use of personal service contracts as a means of providing quality care for your clients and at the same time compensating family members for their hard work, contact John Clardy or Emma Hemness. Thank you, John and Emma.

I would like to extend a special thank you to all those extraordinary people who have done so much in such a short time and have worked tirelessly for the Elder Law Section. You are all extraordinary people.

COMMITTEE REPORTS

Financial Products Special Committee

Jill J. Burzynski, Chair

The Financial Products Special Committee meets on the last Tuesday of every month at 4 p.m. We are working on a project to identify red flags of inappropriate annuity sales. If you would like to join the committee, please contact Jill Burzynski at 239/434-8557.

Legislative Committee

Ellen S. Morris and Alexandra Reiman, Co-Chairs

What are we doing to oppose the deluge of bad bills, and is there anything good happening in Tallahassee?

Consider the following tag lines to use as retorts and to give voice to our opposition to Senate Bill 1356:

1. When you remove the "care" from Managed Care, you get Managed Cost. Vote against Managed Cost.
2. Old people need love, too. Vote against the Destruction of Marriage Act.
3. Are adult children slaves? Caring for aging parents deserves payment, too.

I urge you to read SB 1356. It infringes on our spousal refusal law and will cause seniors to divorce, and it devalues and dismisses the role of caregiver family members. Use the tag lines above when speaking to your clients, to your associates during bar functions and to your local legislators. Better yet, come up with an even better retort and send it to me so we can all benefit from it. We are embarking on a huge grassroots lobbying campaign to expose the unfairness of this bill and others that harm our clients, their families and our practices. Go to our Facebook page and "like" us. We will be sending out scenarios to depict the harm of this bill and others. Please do the same with your own marketing efforts. Please join our calls (reminders are being e-blasted to the entire section) to learn about the rest of the bills that need our grassroots support and opposition.

Some good bills were filed, and we have sent letters of support to the sponsors. They are as follows:

HB 491/S586
HB 513
Senate Resolution 808
House Resolution 789
SB 568
SB 572
SB 208
HB 325/S648
HB 815/S670

We need everyone's advocacy efforts.

Medicaid Committee

John Clardy and Emma Hemness, Co-Chairs

As we submit our report for the *Advocate's* deadline, we have many efforts underway to address proposed legislation within the purview of this committee. Members have adopted a key supporting role to the Legislative Committee and our legislative liaison, Twyla Sketchley.

Two main pieces of proposed legislation have been filed to date. First, both the Senate and the House have released their versions of Medicaid reform bills. The Senate Medicaid reform bill (28-01190A-11) contains specific language to restrict payment to family caregivers under personal care contracts while the House version does not. Second, Senate Bill 1356, sponsored by Senator Dennis Jones, and the House companion bill, HB 1289 sponsored by Representative Larry Ahern, address only two items: 1) the restriction of payments to family caregivers under personal care contracts; and 2) a prohibition on the use of spousal refusal except under very few circumstances.

The Medicaid Committee has aided in the development of a joint public policy position statement representing the "bedrock beliefs" of the section and its "sister" organization, AFELA, and we are in the early stages of mass distribution (copy included on page 7 of this newsletter). The committee created three working groups with team leaders to finalize "talking points" on personal care contracts, spousal refusal and the Medicaid reform bills. These talking points are available for use. These instruments of advocacy, in addition to others that will be created and updated as the needs arise, may be obtained from a new Facebook page. Go to *www.facebook.com* and create an account (if you do not have one). After doing so, visit "Issues for Florida Seniors" and click "like" to link to the page and receive our messages about Medicaid

reform and other issues. Or you can link directly to the Facebook page at *www.facebook.com/pages/Issues-for-Florida-Seniors/134066466645339*.

Finally, a grassroots advocacy plan is underway. Members of the section and AFELA are strongly encouraged to do their part. Use the tools we provide to reach out to members of the community and the general population of seniors and caregivers that are concerned about Medicaid reform, restriction on payment to family caregivers and prohibitions on use of spousal refusal.

Probate Committtee

Sam Boone and Kara Evans, Co-Chairs

As you know, the Probate Rules set out the procedures by which the laws of the statutes are carried out. There is an ongoing mission to scour the statutes to remove the procedural aspects from them and incorporate all procedural process into the Probate Rules. Most of the changes are made during the legislative cycle and are published in all printed copies of the Probate Code. However, below are some out of cycle changes that can be found online at *www.floridasupremecourt.org/decisions/2010/sc10-1928.pdf*. Be sure to bookmark this address or print out a copy and place it in the back of your statute book.

Out of Cycle Rule Revisions

Rule 5.201 NOTICE OF PETITION FOR ADMINISTRATION

This rule was subdivided into paragraphs a, b and c. Paragraph (a) now deals with the notice required when the petitioner is entitled to preference. Paragraph (b) deals with the notice required when the petitioner is not entitled to preference, and paragraph (c) sets out the requirement that the will offered for probate must be attached to the petition when the petitioner serves it by formal notice.

The requirement that the will be attached was formerly contained in Section 733.2123. That statute was amended and the sentence deleted.

Rule 5.260 CAVEAT; PROCEEDINGS

Last year, F.S. 731.110 was amended to cure a lack of consistency between counties with regard to whether or not a pre-death caveat was allowed. Some counties would allow them and some would not. Now it is clear that an interested party (other than a creditor who still must wait until after death to file) may file a caveat prior to death. The pre-death caveat expires in two years and must be re-filed. The statute also changes the requirement for when a filer must appoint a resident agent. The old statute required the appointment if the filer resided outside the county where the caveat was filed. The new statute requires the appointment only if the filer resides outside the state. The requirements for what the caveat must contain were removed from the statute and can now be found in the rule. The rule now also provides that only the last four digits of the caveator's social security number be included.

Rule 5.3425 SEARCH OF SAFE DEPOSIT BOX

This is a new rule made necessary by the changes to F.S. 655.935, which now requires that the officer of the lessor of the box make a complete copy of any document removed during a search of a safe deposit box. This

continued, next page

MARK YOUR CALENDAR!

* * *

June 24, 2011

THE FLORIDA BAR ANNUAL CONVENTION

Gaylord Palms, Orlando, Fla.

Section Chair's Training – 11 a.m.
Awards Luncheon – 12 noon
Section Executive Council Meeting – 2 p.m.

* * *

October 6 - 8, 2011

THE ELDER LAW SECTION RETREAT

The Breakers, Palm Beach, Fla.

* * *

new rule sets out the information required for the petition and the order authorizing the search of the box. The committee's notes for this rule clarify that a search under this rule is not considered an initial opening and so is not subject to the inventory requirements of Rule 5.342.

Rule 5.360 ELECTIVE SHARE

F.S. 732.2125(2) was amended to clarify that an elective share election can only be made by a guardian or an attorney in fact when it is in the best interests of the surviving spouse. Subdivision (1)(2)(c) was added to this rule to require that if the election by either of those parties is approved, the order must include a finding that the election is in the best interests of the spouse during the spouse's probable lifetime. Other changes made to this rule replaced the word "shall" with the word "must."

The Probate Committee will continue to keep the readers advised of further changes to the statutes and rules affecting our practice.

Unlicensed Practice of Law Committee

John R. Frazier, Chair

The Elder Law Section Unlicensed Practice of Law Committee has five committee members. The committee holds a monthly teleconference on the third Tuesday of every month at 4 p.m. The UPL Committee has prepared an outline to serve as a basis for a new UPL Florida Supreme Court Advisory Opinion. The draft of the Advisory Opinion will be prepared by the Florida Bar UPL Standing Committee.

The UPL Committee will continue to write publications to increase awareness of the UPL problem in Florida, and the committee will continue to encourage and facilitate the filing of UPL complaints with The Florida Bar.

Congratulations to Kari Glisson

Kari Glisson, executive director of the Academy of Florida Elder Law Attorneys (an allied organization of the ELS), is pleased to announce the birth of her first child. She and her husband, Jason, a Leon county educator, welcomed their son, Koen, on Dec. 7, 2010.

Kari with her son, Koen, at Myers Park in Tallahassee on Feb. 26

2011-2012 ELS slate of officers

The following 2011-2012 slate of officers has been submitted for approval by the Elder Law Section Nominating Committee. The Elder Law Executive Council voted to approve the nominations at the section's council meeting, Mar. 31, 2011, at the Hilton Fort Lauderdale Marina.

Chair
Enrique Zamora
Coconut Grove

Chair-Elect
Twyla L. Sketchley
Tallahassee

Administrative Chair
Jana McConnaughhay
Tallahassee

Substantive Chair
John S. Clardy III
Crystal River

Treasurer
David Hook
New Port Richey

Secretary
Ellen S. Morris
Boca Raton

Past Chair
Leonard E. Mondschein
Miami

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

Joint Public Policy Position Statements

Who Are We?

The **Elder Law Section** (the Section) of the Florida Bar consists of over 1,500 attorneys throughout the State of Florida whose law practice focuses predominantly on serving a vulnerable population: the elderly and persons with special needs.

The **Academy of Florida Elder Law Attorneys** (AFELA) represents the state chapter of a national elder law attorney organization known as the National Academy of Elder Law Attorneys, representing over 3,800 elder law attorney members.

The Section and AFELA consider themselves "sister" organizations in promoting the common purposes of those devoted to a practice of elder law.

What Is Our Purpose?

The Section's and AFELA's purpose is to ensure its elder law attorney members are the providers of premier legal counsel on matters affecting the elderly and persons with special needs. Collectively, these organizations are advocates for its attorney members as well as the elderly and disabled clients whom the elder law attorneys serve.

Top Five Public Policy Statements

The Section/AFELA outlines its "Top Five" public policy statements formulated to address an array of recently proposed legislation affecting the elderly consumer.

In brief, elderly consumers should be vested in their own health care decisions by allowing them meaningful decision-making regarding their long term care. When the elderly consumer is vested in his or her own health care decisions, this promotes better care and reduces overall costs. In this regard:

1. Elderly consumers should be able to select the least restrictive environment in which to receive their long term care. This means having the ability to remain in the home or in a community-based care facility for as long as possible, avoiding institutionalization and enhancing overall quality of life.
2. Elderly consumers should be able to choose among providers of their long term care services, which may include the ability to pay family caregivers without arbitrary restrictions. Mandating the elderly consumer to enroll in a program of health care without any true selection among providers can be likened to mandating individuals to purchase into health care insurance coverages. Coupled with lack of any choice in a true market, tying payments on behalf of the elderly consumer to a "per head" basis fails to ensure quality of care delivered.
3. Government financial support systems allowing continuous and uninterrupted access to long term care services in the least restrictive environment support elderly consumers' desire to be fiscally responsible by avoiding the most expensive institutional settings. If in the interest of controlling costs the government financial support systems lack alignment with true cost-saving objectives, the avoidable and unnecessary expense of institutionalization for the elderly consumer increases the burden borne by all taxpayers.
4. Elderly consumers deserve: quality of care; quantity of care; and safety and security in any environment in which they reside. Adequate and appropriate regulations are required to assure these basic fundamental rights.
5. Elderly consumers face specific challenges as they age. The stress of a long term illness creates tremendous strain on the nuclear family consisting of husband, wife and adult children. Elderly consumers should not suffer additional burdens brought about by draconian requirements,which, in effect, devastate the nuclear family, prompt divorces and undermine the sanctity of marriage.

In Summary

The Section and AFELA are very concerned about the current political climate and what appears to be an onslaught against the elderly and persons with special needs.

Please refer to the attached page for more depth of information regarding key positions of interest. If your organization is interested in further discussion about any of the Section/AFELA policy statements, please do not hesitate to contact_____ [assigned volunteer/local team member].*

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**Note: We anticipate this public policy statement and additional information will be distributed to legislators as well as organizations that share our mutual concerns. We have identified specific volunteers who will be the contact persons for legislators as well as the organizations.*

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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Offshore financial accounts IRS Voluntary Disclosure Initiative, "Round Two"

by Michael A. Lampert


M. LAMPERT

For many years the IRS has been ramping up enforcement of undisclosed offshore financial accounts. While it is not illegal to have these accounts (other than in a few "enemy" countries), there are strict reporting requirements for these accounts, and of course the income on these accounts is subject to income tax.

Over the last few years, the IRS has significantly increased enforcement in this area, both civilly and criminally. In addition to the well publicized UBS case (where the names of thousands of U.S. "taxpayers" were turned over to the IRS), the IRS has been obtaining information from other sources. These sources include whistle blowers and informants, including disgruntled employees, who turn over records to the IRS.

The IRS also obtained significant information from taxpayers who disclosed in the first voluntary disclosure initiative. The IRS is now using that information as leads to catch others. In addition, many other countries have a similar problem with unreported offshore accounts. Some of these countries share information with the IRS. Finally, the IRS has employees, including criminal investigators (special agents), based in many other countries. The likelihood of the client getting caught continues to increase.

While the IRS has long had either a formal or informal program to voluntarily disclose unreported U.S. or offshore income and accounts, in 2009 the IRS announced a special offshore voluntary disclosure program. While it was often referred to as an "amnesty," it really was a penalty framework that provided some certainty for penalties and an exemption from criminal prosecution. For many clients this was significant. For example, willful violation of the requirement to file a Foreign Bank and Financial Account Report (FBAR) is the greater of $100,000 or 50 percent of the balance of the account at the time of the violation.

FBAR filing is required for ownership or control over offshore financial accounts totaling more than $10,000. The FBAR requirement also applies to control over foreign accounts through entities including trusts. There are also penalties for failure to report foreign ownership of a trust or other entities, to name just a few of the many offshore reporting requirements. The offshore reporting penalties, along with interest and "regular" penalties, including civil fraud, can potentially far exceed the value of the assets.

Well over 10,000 taxpayers took advantage of the first special offshore account voluntary disclosure program. However, the program expired in October 2009.

On Feb. 8, 2011, the IRS announced the 2011 Offshore Voluntary Disclosure Initiative. It is similar to the first program, with several key differences. The "amnesty" penalty increased from 20 percent to 25 percent of the highest aggregate account balance in the undisclosed offshore account for an eight (previously six) year period (2003 through 2010). In addition, with the prior program you could start the disclosure process by the deadline. The new program requires that the requirements of the program, including return filing, be completed by the Aug. 31, 2011, deadline. This is a very short timeframe to gather all of the records and prepare all of the required returns.

Why is this important to the lawyer practicing elder law? First, there actually are elder clients that earned funds, didn't pay the tax and essentially hid the funds offshore. Second, there are clients who earned income, paid the tax on the earnings and placed some of the net income in offshore accounts for various reasons. Many of my clients did it for safety—it couldn't happen in Germany, and it couldn't happen here. Third are the holocaust cases, Iranian refugees and others who fled various countries. These accounts were often opened in the 40s, 50s and 60s by holocaust survivors, Iranian and Cuban refugees and others.

Many of these clients have not told their children of the accounts, have not told their attorneys about the accounts and have not told their accountants about the accounts. This is true despite the box on the Form 1040 income tax return that specifically asks if you have a foreign financial account. The clients are worried about getting caught, worried about how the children will handle the account and, in some cases, embarrassed.

The elder law attorney should be asking about the possible existence of foreign financial accounts as part of the normal interview process. If the client has unreported offshore accounts, the client should be promptly referred to a tax attorney with experience in offshore voluntary disclosure cases.

Michael A. Lampert *is a board certified tax lawyer and chair-elect designate of The Florida Bar Tax Section. He regularly handles federal and state tax controversy matters.*

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A 501(c)(3) Non-Profit Corporation

The right to bear arms as a removable right in incapacity proceedings

by Enrique Zamora and Stephanie M. Villavicencio

E. ZAMORA

S. VILLAVICENCIO

On Jan. 8, 2011, a terrible tragedy occurred in Tucson, Ariz. A mentally unstable individual opened fire, killing six and injuring 14, outside of a supermarket where U.S. Representative Gabrielle Giffords and a group of her constituents assembled at a meet-and-greet.[1] One of Rep. Giffords' staffers, three retirees, a federal judge and a precious 9-year-old girl were killed at the hands of a mentally unstable individual who carried a gun.[2]

The unfortunate truth is that not much thought is put into the fact that individuals who are incapacitated should not have the right to own, possess or carry a firearm. In fact, several states do not restrict the right to bear arms to persons who have been found incapacitated by the judicial system.[3] Twenty-one states conduct checks for firearm purchases using the National Instant Criminal Background Check System (NICS) required by Congress.[4] NICS was mandated by the Brady Handgun Violence Prevention Act of 1993, which "imposed as an interim measure a waiting period of 5 days before a licensed importer, manufacturer, or a dealer may sell, deliver, or transfer a handgun to an unlicensed individual."[5] This program would apply to any person who has been adjudicated as "mentally defective" or "committed to a mental institution."[6]

The Second Amendment of the United States Constitution reads: "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[7] The Supreme Court recently decided a landmark case, *McDonald v. City of Chicago*, holding that the Second Amendment does not apply only to the federal government, but applies to state and local governments as well.[8] This case illustrated that the right to bear arms is a fundamental right, as are freedom of speech and freedom of religion, among others, and held that this right is one that cannot be infringed upon by state and local governments. Further, *McDonald v. City of Chicago* repeated the longstanding regulatory measure of prohibiting the possession of firearms by felons and mentally ill individuals.[9] Furthermore, Congress may pass legislation to place limits on the right to bear arms for persons who have been involuntarily committed.

Some states have laws regarding the right to bear arms in relation to those individuals who are adjudicated incapacitated. For example in California and Connecticut, health professionals treating inpatients must report a patient's gun possession to law enforcement agencies and judicial bodies.[10] A study was performed in 2004 that designated three categories of statutory restrictions, which included mentally ill individuals who were legally adjudicated as incapacitated.[11] The study discussed how the firearms statutes across the United States are not uniform and vary considerably on the manner in which the "restricted individual" is defined.[12] Of course, federal law provides the restrictions for states that have no restrictions or less-restrictive statutes.

Pursuant to statute, Florida requires the Department of Law Enforcement to review any records available to determine if the potential buyer or transferee has been adjudicated mentally defective or has been committed to a mental institution by a court and as a result is prohibited by federal law from purchasing a firearm.[13] Section (4)(a) of the statute defines the term "adjudicated mentally defective" as meaning "a determination by a court that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease, is a danger to himself or herself or to others or lacks the mental capacity to contract or manage his or her own affairs." The statute goes on to say "[t]he phrase includes a judicial finding of incapacity under s. 744.331(6)… ."[14] Further, Florida Statutes § 790.065(2)(c) states that "Clerks of court shall submit these records to the department within 1 month after the rendition of the adjudication or commitment." The purpose of this section is to ensure that the information is present in the system when the Department of Law Enforcement reviews the record of the purchasing or transferring individual. As a result, it also ensures that firearms are kept out of the hands of mentally unstable individuals.

Meanwhile, Florida Statutes § 744.3215 (3) lists the specific rights that may be removed from persons by an order determining incapacity and may be delegated to the guardian.[15] These rights include the rights to: (a) contract; (b) sue and defend lawsuits; (c) apply for government benefits; (d) manage property or make any gift or disposition of property; (e) determine his or her residence; (f) consent to medical and mental health treatment; and (g) make decisions about his or her social environment or other social aspects of his or her life.[16] This list does not include the right to bear arms as a right that can be removed from a person who is

continued, next page

Right to bear arms
from preceding page

declared incapacitated. Further, the list does not include the requirement of notice of incapacitated individuals to be published. The authors believe that Chapter 744 should list the right to bear arms as a right that can be removed and should require that incapacitated individuals be reported to the Department of Law Enforcement to ensure they will not be able to retain a firearm. Florida Statutes § 744.3215 (1) lists the rights that are retained by the ward.[17] The right to bear arms does not appear in either section of the statutes.

Thus, Section 744.3215 defines which rights are retained or can be removed from an individual; however, it does not include the right to bear arms. This is especially troubling because of the potential harm that can stem from this right. The right to bear arms should be included in the list of rights that can, and should, be removed from a ward. The right to bear arms is one that historically has been highly regulated, and it should be one of the rights removed from certain incapacitated persons. In fact, many states, and even the Veteran's Administration (VA) have already acted on such an idea by reporting incapacitated individuals and veteran patients to the NICS, required by the Brady Act if a patient has been "adjudicated as a mental defective."[18] The *Navy Times* tells us that "[b]y law, anyone 'adjudicated as a mental defective,' such as people found to be a danger to themselves or others or who lack the mental capacity to manage their affairs, must be registered in the database."[19] When an individual is registered in the database, his or her weapons permit can be revoked, thus consequently removing his or her Second Amendment right. The *Navy Times* article also tells us that the "VA has been turning over the names of veterans who have had someone else appointed to handle their financial affairs."[20] The reason behind these actions is because of the harm that can be done to others or the patients themselves.[21]

An example of potential harm occurred in a Miami-Dade County courthouse several years ago. This incident involved one of the wards under the court's supervision who tried to smuggle a handgun to attend a hearing on his case. Fortunately, the gun was detected when the ward passed through security. Because of this incident, Miami-Dade is the only county in Florida that specifically lists the right to bear arms as a removable right in incapacity proceedings pursuant to local rule. This is specific to Miami-Dade County's 11th Judicial Circuit, and it has not been adopted by other Florida circuits. Consequently, every plenary and some limited guardianships in Miami-Dade County have a stamp placed on the judicial orders and letters that states the ward cannot have access to weapons or firearms. Although this procedure is particular to Miami-Dade County, it is a practice the authors believe should be followed in all jurisdictions.

The incident in the Miami-Dade courthouse, as well as the tragedy that occurred in Tucson, are prime examples of why the right to bear arms should be included as one of the removable rights in Section 744.3215 of the Florida Statutes. Because state and local governments can now regulate the right to keep and bear arms, pursuant to the Supreme Court ruling in *McDonald*, the Florida Legislature has the authority to amend Section 744.3215 of the Florida Statutes to include the right to bear arms in the list of rights that may be removed from wards. This is a very important step in moving forward to protect citizens in our communities, including the wards themselves.

Enrique Zamora, Esq., *is a Florida Bar board certified elder law attorney and partner with the firm Zamora*

Member news


M. LOCKWOOD

Lockwood Law Group expands practice areas

Marcia J. Lockwood, Esq., announces that her law office, in Sarasota, Fla., formerly known as The Family Law Clinic, has changed its name and is now doing business as Lockwood Law Group. The change reflects the law firm's growth in the areas of litigation in guardianships, appellate law and elder law, as well as family law and criminal law. The law firm continues to offer free consultations and its unique income-sensitive rates with sliding fee scale. Lockwood can be reached at 941/952-5815.


C. ROBINSON

Robinson elected to BayCare Alliant's board

Charles F. Robinson, a Florida Bar board certified elder law attorney practicing in Clearwater, Fla., has been elected to the board of directors of BayCare Alliant Hospital. He recently addressed the Suncoast Estate Planning Council at All Children's Hospital Education Center and participated in an Elder Law Forum at Emeritus at Beckett Lake in Clearwater.

& Hillman, with offices in Coconut Grove, Fla. He is chair-elect of the Elder Law Section of The Florida Bar and an adjunct professor at St. Thomas University School of Law, where he teaches a course in elder law. He has acted as special general magistrate, guardian advocate and special public defender in Baker Acts and Marchman Acts in Miami-Dade County. He received his JD degree, cum laude, from the University of Miami in 1985.

***Stephanie M. Villavicencio, Esq.**, is an associate with Zamora & Hillman. She received her JD, cum laude, from St. Thomas University.*

Endnotes:

1 *See* "Arizona Shooting," *N.Y. Times*, Jan. 12, 2011, http://topics.nytimes.com/top/reference/timestopics/ subjects/a/arizona_shooting_2011/index.html?offset=0&s=newest.

2 *See Id. (*discussing the six victims who were murdered).

3 *See* Donna M. Norris, et al., "Firearm Laws, Patients, and the Roles of Psychiatrists," *Am J Psychiatry* 163:8, August 2006, 1393.

4 *See National Instant Criminal Background Check System*, Federal Bureau of Investigation, *available at* http://www.fbi.gov/about-us/cjis/nics; *see also* 28 C.F.R. § 25.1 (1998).

5 *See* 63 Fed. Reg. 58272 (Oct. 29, 1998).

6 *See Id.*

7 U.S. Const. Amend. II.

8 *See McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) *available at* http://www.supremecourt.gov/opinions/09pdf/08-1521.pdf.

9 *See Id.* at 39.

10 *See* Cal. Welf. & Inst. Code § 8100-8108 (2008); *see also* Conn. Gen. Stat. § 29-28 (2010).

11 *See* Donna M. Norris, et al., "Firearm Laws, Patients, and the Roles of Psychiatrists," *Am J Psychiatry* 163:8, August 2006, 1392.

12 *See Id.* at 1393.

13 *See* Fla. Stat. § 790.065(2)(a)(4) (2010).

14 *See* Fla. Stat. § 790.065(2)(a)(4) (a.) (2010).

15 *See* Fla. Stat. § 744.3215(3) (2010).

16 *See Id.*

17 *See* Fla. Stat. § 744.3215(1) (2010).

18 *See* "America's 1st Freedom," *NRA News*, Nov. 2009, at 18 *available at* http://motherjones.com/files/ NRA-1st-Freedom-Mother-Jones.pdf. (stating that "VA records are reported to the National Instant Criminal Background Check System ("NICS") if a patient has been 'adjudicated as a mental defective …'").

19 *See* Rick Maze, "Bill aims to protect vets' gun rights," *Navy Times*, Apr. 27, 2009, http://www.navytimes. com/news/2009/04/military_veterans_guns_042709w/.

20 *See Id.* The article goes on to say that under this policy, since 1998, the VA has sent the names of more than 117,000 veterans to the Justice Department.

21 *See* Deborah Sontag & Lizette Alvarez, "Across America, Deadly Echoes of Foreign Battles," *N.Y. Times*, Jan. 13, 2008, http://www.nytimes.com/2008/01/13/us/13vets.html?_r=1.

Call for papers – *Florida Bar Journal*

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

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

A tale of two spouses

The tale

Thelma came into my office upset. Her husband had died on Sept. 29, 2010. He had been ill and they had been meaning to go to the attorney's office to sign a Last Will and Testament, but he had died suddenly before they could get to it. It was a second marriage, and the stepchildren had always been hostile to Thelma, who was not much older than the oldest daughter. They did not have much money, but he had a small life insurance policy, with Thelma and the children as beneficiaries. Other than that, there was the home where they had lived for the past 10 years, which her husband had purchased prior to their marriage. She did not want to leave her home and thought she could afford to pay the mortgage. She asked if I could help her get her name on the house because her husband had promised it would be hers. "No," I answered. "I am sorry, but you are entitled only to a life estate. Your husband's children will actually own the house. But don't worry, they will have to pay the principal on the mortgage, and you will have to pay only the interest." Thelma looked at me as if I were crazy and told me her husband's children were deadbeats and did not have any money to pay. Once again she asked me, "How can I get my house?"

Louise came into my office upset. Her husband had died on Oct. 29, 2010. He had been ill and they had been meaning to go to the attorney's office to sign a Last Will and Testament, but he had died suddenly before they could get to it. It was a second marriage, and the stepchildren had always been hostile to Louise, who was not much older than the oldest daughter. They did not have much money, but he had a small life insurance policy with Louise and the children as beneficiaries. Other than that, there was the home where they had lived for the past 10 years, which her husband had purchased prior to their marriage. She did not want to leave her home and thought she could afford to pay the mortgage. She asked if I could help her get her name on the house because her husband had promised it would be hers. "Yes," I answered. "I can help you get ownership of one-half of the house."

The tip

So, why could I help Louise but not Thelma? The answer lies in the new F.S. 732.401, which became effective Oct. 1, 2010. The old 732.401 read as follows:

732.401 Descent of homestead.

(1) If not devised as permitted by law and the Florida Constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.

(2) Subsection (1) shall not apply to property that the decedent and the surviving spouse owned as tenants by the entirety

Tips & Tales

Kara Evans

This was devastating to Thelma, who believed her husband would leave her the home. Under the old statute, expenses between the life tenant (Thelma) and the remaindermen (the husband's children) were allocated by the Principal and Income Section 738 of the Florida Statutes. Basically the spouse was responsible for the interest on the mortgage payments, property taxes, property insurance and ordinary repairs. The kids were responsible for the principal portion of the mortgage and any extraordinary repairs or capital improvements. Furthermore, Thelma needed her husband's children to cooperate in the sale of the home, and then she would have to accept the value of the life estate. Imagine that conversation!

Fortunately, there is now a new F.S. 732.401, which reads in part:

732.401 Descent of homestead.

(1) If not devised as authorized by law and the constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.

(2) In lieu of a life estate under subsection (1), the surviving spouse may elect to take an undivided one-half interest in the homestead as a tenant in common, with the remaining undivided one-half interest vesting in the decedent's descendants in being at the time of the decedent's death, per stirpes.

This new statute is a blessing to Louise, whose husband died after the effective date. She is now a tenant in common owner with the children, and she owns one-half of the home. There may not be an easy relationship between the children and Louise, but at least she has an ownership interest. This gives her the ability to bring a partition action to force a sale if she wishes, an option not available to a life tenant. After the sale she would have one-half of the proceeds with which to purchase her own home, to invest or to do with whatever she pleases.

Kara Evans *is a sole practitioner in the Tampa Bay area. She is board certified in elder law, a member of the Florida and New York Bar associations and has a master's degree in taxation.*

Summary of selected caselaw

by Alex Cuello

Harris v. State, 35 FLW D1844a (Fla. 1st DCA 2010).

Harris appealed his conviction of attempted second degree murder. His conviction was based on the admission into evidence of out-of-court statements made by prosecution witnesses. The witnesses testified they saw Harris fight with the victim and then shoot him and flee. The officer who responded to the crime scene testified as to the statements made to him by the prosecution witnesses. The trial court admitted the out-of-court statements into evidence as prior consistent statement under Section 90.801(2)(b), F.S. Under that provision, an out-of-court statement is not hearsay if the declarant testifies at trial, the statement is consistent with the declarant's testimony and the statement is offered to rebut an express or implied charge … of improper influence, motive or recent fabrication. The appellate court affirmed the conviction, holding that the statements were admissible under Section 90.801(2)(c), F.S., which provides that an out-of-court statement is not hearsay if it is one of identification of a person made after perceiving the person and the declarant testifies and is subject to cross examination.

Burton v. State, 35 FLW D1842b (Fla. 1st DCA 2010).

The trial court found that Burton's failure to follow her doctor's instruction and recommendations rendered her pregnancy "high-risk" and found a "substantial and unacceptable risk" of severe injury or death to the unborn child if Burton continued to refuse to follow the prescribed course of treatment. The trial court ordered Burton to comply with her doctor's orders, which included bed rest, medication to postpone labor and to prevent and treat infection, and eventual performance of a cesarean section delivery. The appellate court reversed, stating that the Florida law is clear in that "every person has the right 'to be let alone and free from government intrusion into the person's private life.'" Art. I, Sec. 23, Fla. Const. The appellate court cited *Guardianship of Browning*, 568 So.2d 4 (Fla. 1990) for its holding that the fundamental right to privacy encompasses a person's "right to sole control of his or her person" and the "right to determine what shall be done with his own body." And that "a competent person has the constitutional right to choose or refuse medical treatment, and that right extends to all relevant decisions concerning one's health." The state must demonstrate a compelling state interest to override a pregnant woman's constitutional right to the control of her person. The state's potential interest in the life of an unborn fetus becomes "compelling" when the fetus becomes viable outside the womb.

Golden & Cowan v. In Re: Estate of Silvia M. Locascio, 35 FLW D1885a (Fla. 3rd DCA 2010).

The probate court's denial of a law firm's lien under 733.608, F.S., was affirmed. The law firm was neither a personal representative, nor curator, nor counsel.

Covenant Trust Co. v. The Guardianship of Lillian Ihrman, 35 FLW D2074a (Fla. 4th DCA 2010).

The guardian moved the ward from the home owned and operated by the trustee and filed a petition to order payment of monthly costs of care of the ward at the new home and a petition to remove the covenant as trustee. The trustee (covenant) was headquartered in Illinois and moved to dismiss for lack of *in personam* jurisdiction. To determine jurisdiction over a non-resident trustee defendant, the court must conduct a two-part analysis. First, it must be determined that the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of the [long arm] statute (48.193, F.S.); and if it does, the next inquiry is whether sufficient minimum contacts are demonstrated to satisfy due process requirements. Pursuant to F.S. 736.0205 (Trust proceedings, dismissal of matter relating to foreign trusts), over the objection of a party, the court shall not entertain proceedings under s. 736.0201 (principal place of administration), or having its principal place of administration in another state unless all interested parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration. The court should conduct a limited evidentiary hearing to determine the issue of jurisdiction. Next, the trustee appealed the court order to prohibiting payment of the trustee's attorney's fees under 736.0802(10), F.S., for alleged breach of fiduciary duty. Under 736.0802(10)(b), F.S., to obtain an order prohibiting payment of costs or attorney's fees from trust assets, a party must make a reasonable showing by evidence in the records or by proffering evidence that provides a reasonable basis for a court to conclude that there has been a breach of trust. The court's failure to enter an order without making a finding of breach of trust warrants reversal of the order denying payment of the trustee's attorney's fees and costs without court order. Last, the trustee appeals the court's order requiring payment of the guardian's attorney's fees. Absent a legal mandate by the trust provision and a finding that the trustee acted arbitrarily, the court lacked authority to order the trustee to pay the guardian's attorney's fees.

Golden & Cowan v. The Estate of Hilda Kosofsky, 35 FLW D2325a.

Admission of telephonic testimony of a witness without a notary public or

any person authorized to administer an oath was harmless error and not an abuse of discretion. Under Florida Rule of Judicial Administration 2.530(d)(1), a judge may, if all parties consent, allow the use of telephonic testimony. However, the improper introduction of the telephonic testimony constituted harmless error due to the existence of other independent evidence, which would have led the trial court to reach the same conclusion.

Edward K. Sowden, Jr., v. Gregg Almirantes Brea, 35 FLW D2338a.

The trial court held that subsequent to the ward's death, it was not permitted to consider petitions seeking payment of attorney's fees and costs previously agreed to at mediation by the parties and approved by the court. In reversing the trial court, the appellate court held that the ward's death does not prevent a trial court from enforcing an order previously entered in the guardianship case. The trial court had the authority to enforce its prior order requiring the parties to comply with the court-approved mediation settlement agreement.

Aronson v. Aronson, 35 FLW D2404a (Fla. 3rd DCA 2010).

The decedent executed a revocable trust naming himself as sole trustee and then transferred a condominium to the trust. The decedent's sons were the successor trustees. The condominium became the decedent's and his widow's homestead. The trust provided that the trustee shall pay the trust income to the widow as well as portions of the principal at the discretion of the trustee as are necessary or desirable for her support and maintenance. On appeal, the trustees contend that the trial court erred in ordering that the trust transfer an interest in the condominium to the widow instead of selling it. They argue that continued invasion of the principal through transfers of interest would eventually eliminate their remainderman benefits. The widow asserted the trial court correctly ordered the transfer of the property interest. The appellate court agreed with the widow, holding that the exemption from forced sale in Section 4(b) of Article X of the Florida Constitution inures to the widow.

Boren v. Suntrust Bank, as Personal Representative of the Estate of Jane Harris Small and Brian Miller, 35 FLW D2449a (Fla. 2nd DCA 2010).

The decedent executed a deed on her condominium wherein she retained a life estate. Pursuant to the warranty deed, the grantor had an exclusive right to sell the condominium to a third party upon the termination of the life estate for the benefit of the heirs. If the grantor was unable to sell the condominium within one year, the grantor was required to pay the decedent's heirs for the condominium. The heirs objected to the personal representative's compensation because it was based on the inventory value, which included the condominium as a nonexempt asset. The court overruled the objection, holding that the decedent's estate had only a contractual right to receive the proceeds from the sale of the condominium, which were not subject to homestead protected status. The court rejected the heir's argument that *White v. Theodore Parker, P.A.,* 821 So.2d 1276 (Fla. 2nd DCA 2002) controlled. In *White* the decedent died before finalizing a contract to sell his homestead property. The court held that White died holding title to the property, and as a result, the proceeds from the sale were protected by the homestead protection.

Fair Hearings Reported

by Katrina M. Thomas

Petitioner v. Respondent, Appeal No. 09N-00074 (July 1, 2009).

The petitioner became a resident of a nursing facility on Sept. 12, 2007. The facility issued a nursing home transfer and discharge notice on Apr. 23, 2009, effective May 23, 2009, citing the petitioner's needs could no longer be met at that facility. The reasons cited for the discharge included increased aggressive behaviors, destruction of property, false accusations of abuse from staff members, urinating on couches and taking things off the walls and destroying them. The petitioner's family requested the hearing because the original discharge notice listed the petitioner's father's residence as the discharge location. However, the petitioner's father, due to age and health issues, was unable to care for the petitioner.

At issue is the respondent's notice of discharge to the petitioner effective May 23, 2009, due to the behavioral patterns displayed by the petitioner. Federal regulations limit the reasons for which a Medicaid or Medicare certified nursing facility may discharge a patient and requires that when a facility transfers or discharges a resident, the resident's clinical record must be documented. When a transfer or discharge is necessary for the resident's welfare and when the resident's needs cannot be met in the facility, such documentation must be made by the resident's physician.

The nursing home transfer and discharge notice issued on Apr. 23, 2009, was not signed by a physician, nor was

continued, next page

a physician's written order or other documentation attached. Further, at the hearing, the facility did not submit any physician's written order or documentation from the clinical record that the discharge was necessary for the petitioner's welfare and that the petitioner's needs could not be met in the facility. Appeal granted.

Petitioner v. Respondent, Appeal No. 09F-04842 (Sept. 21, 2009).

The petitioner is a severely disabled child, is bedridden and needs constant assistance with all activities of daily living. The petitioner lives with and is cared for at home by his mother, a single parent, along with an 8-year-old sibling, who attends special school and is under medication. The petitioner's father is not involved with the care of the petitioner.

The petitioner's mother, as caregiver, reported she did not feel capable of caring for the petitioner. On July 2, 2009, a request was submitted on behalf of the petitioner for 24 hours, seven days a week of private duty nursing for the period of July 6, 2009, to Jan. 1, 2010. On July 6, 2009, the request was reviewed by KePRO, the peer review organization contracted by AHCA to perform medical reviews for the private nursing program for Florida Medicaid beneficiaries.

At issue is the respondent's action of July 7, 2009, denying the petitioner 358 hours of private duty nursing (PDN) services of 4,320 requested for the certification period July 6, 2009, to Jan. 1, 2010. The respondent bears the burden of proof in this appeal.

The KePRO physician reviewer explained that the PDN program is to provide supplemental care, and it requires the assistance of the parent or primary caregiver. The Home Health Services Coverage and Limitations Handbook (July 2008) provides, in pertinent part, that "private duty nursing services are authorized to supplement care provided by parents and caregivers. Parents and caregivers must participate in providing care to the fullest extent possible." The evidence demonstrated that the respondent's action to approve 3,962 PDN hours and deny 358 PDN hours from the total 4,320 hours requested was within the rules of the PDN program. Appeal denied.

Petitioner v. Respondent, Appeal No. 09F-03230 (July 16, 2009).

The 15-year-old petitioner has cerebral palsy and is a Medicaid benefits recipient. A recipient denial letter dated Apr. 2, 2009, was issued, stating that 4,010 hours of skilled home nursing services were approved and that 258 hours were denied for the petitioner for Apr. 30, 2009, through Oct. 26, 2009. The petitioner filed for reconsideration, and a reconsideration denial upheld letter was issued, upholding the terms of the initial recipient denial letter.

At issue is the respondent's Apr. 29, 2009, action of approving the petitioner's skilled home nursing services for 4,010 hours and denying 258 hours for Apr. 30, 2009, through Oct. 26, 2009. The petitioner has the burden of proof.

KePRO determined that the medical care of the private duty nursing services of 4,010 hours was medically necessary. The skilled home nursing service hours that were denied were for two hours from 12 noon to 2 p.m. on Mondays, Tuesdays, Thursdays, Fridays and Saturdays. The denial of 258 hours was based on the petitioner's condition and his parents' work hours. The evidence showed that one of the services performed by the private duty nurse is teaching, which is training for the petitioner's caregivers and his parents. Given the doctor's testimony at the hearing that the petitioner's parents, as his caregivers, could care for the petitioner for the denied hours of home nursing care, the appeal was denied.

Petitioner v. Respondent, Appeal No. 10N-00004 (April 1, 2010).

The petitioner, a smoker, resided at a nursing facility for an extended period due to serious physical health problems. Following the advent of her residence there, the facility's smoking policies became more restrictive. The petitioner acknowledged she was advised of the new smoking policies and received counseling and education regarding the same.

The revised smoking policy provides that the latest time for smoking in the permitted area, located closer to professional care-giving staff, was between 9 and 9:30 p.m. The petitioner acknowledged that after the policy change, she had smoked in both undesignated areas and times. Such non-compliance was repeatedly documented in the medical records.

On Dec. 29, 2009, the respondent issued a nursing home transfer and discharge notice showing intent to discharge the petitioner due to safety endangerment factors. The respondent planned to discharge the petitioner to a location with more permissive smoking policies; however, the petitioner desired to remain at the facility where her good friend also resided.

The regulations at 42 C.F.R. s. 483.12 address nursing facility admission, transfer and discharge rights for residents and provide that safety endangerment of others in a facility can provide justification for discharge. Evidence showed that noncompliance with the smoking procedures created a potential safety problem for other individuals at the facility. Appeal denied.

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