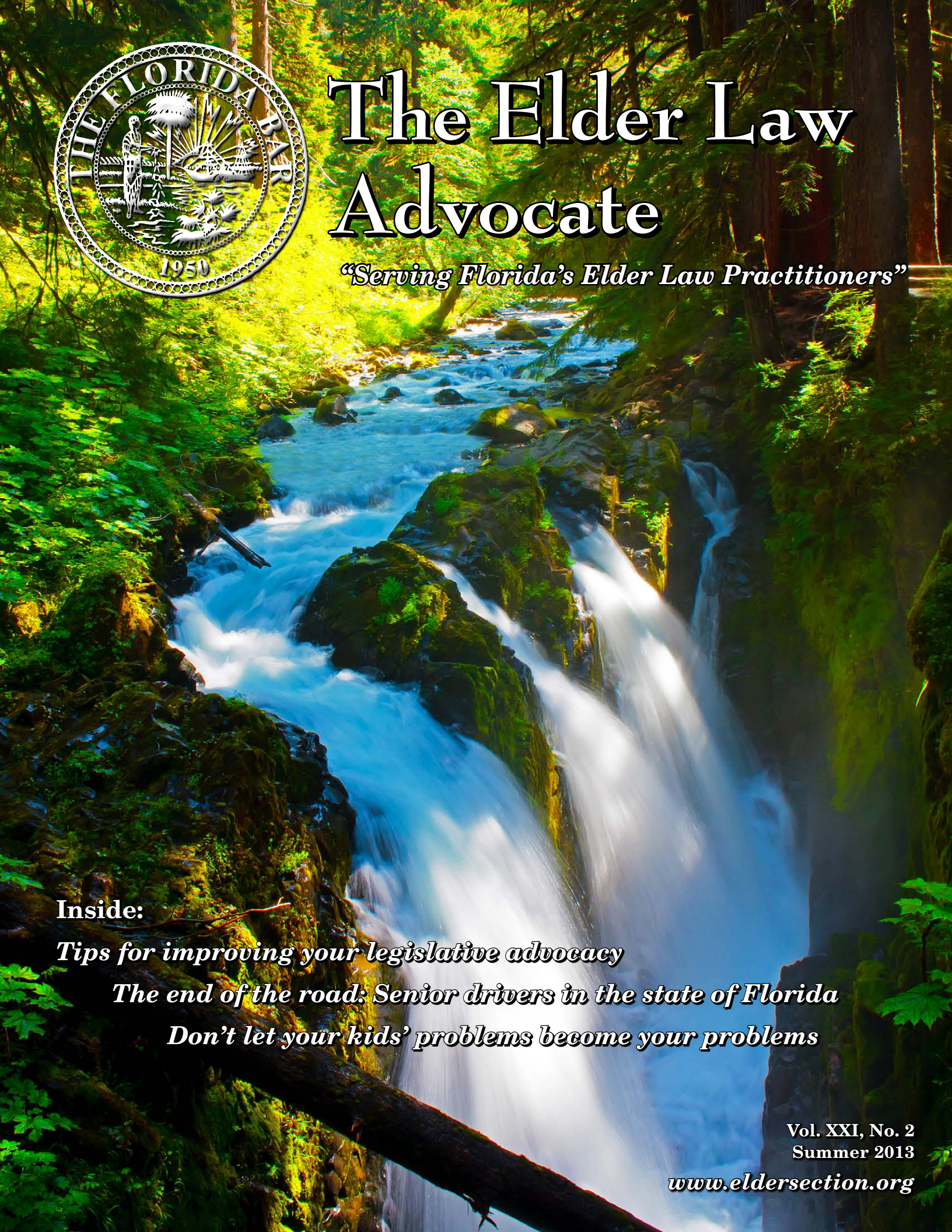

The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Inside:

Vol. XXI, No. 2
Summer 2013

www.eldersection.org

The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar

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Statements or expressions of opinion or comments appearing herein are those of the contributors and not of The Florida Bar or the section.

The Elder Law Advocate will be glad to run corrections the issue following the error.

COVER ART

"Sol Duc Falls"

by Randy Traynor, Florida Bar Staff
(www.randytraynorphotography.com)

Contents:

The deadline for the WINTER ISSUE is November 1, 2013. 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 Stephanie M. Villavicencio at svillavicencio@zhlaw.net, or call Arlee Colman at 800/342-8060, ext. 5625, for additional information.

Advertise in *The Advocate*

The Elder Law Section publishes three issues of The Elder Law Advocate per year. The deadlines are March 1, July 1 and November 1. Artwork may be mailed in a print-ready format or sent via email attachment in a .jpg or .tif format for an 8-½ x 11 page.

Advertising rates per issue are:		
	Full Page	$750
	Half Page	$500
	Quarter Page	$250

The newsletter is mailed to section members, Florida law libraries and various state agencies. Circulation is approximately 1,900 in the state of Florida.

Interested parties, please contact Arlee Colman at *acolman@flabar.org* or 850/561-5625.

A great time to be an elder law attorney

Practicing elder law in Florida certainly has its challenges. Clients whose age or illness causes them to make poor decisions. People in positions of trust who have priorities other than the well-being and care of a senior. Non-attorney planners and consultants unfettered by advertising rules or the attorney-client relationship. The evolving and always changing rules and regulations of public programs vital to seniors.

What is an elder law attorney to do?

Florida has roughly 3.2 million seniors. That is more than 21 other states' *total* population. Florida has one of the largest and most active state elder law bars in the country. We are a positive force for the protection and enhancement of our clients' rights and dignity. In the coming year, each of us will have the opportunity to help our clients on an individual basis. But what can we do as a group?

Your Elder Law Section will be working in a number of areas to promote the practice of elder law. Some of the issues we will be tackling this year include increasing awareness of the problems associated with elder abuse and exploitation, continuing our efforts to protect the public from the unauthorized practice of law and ensuring that Florida's drastic overhaul of the Medicaid program complies with the law and serves the needs of the state's senior and disabled population.

Our Abuse, Neglect and Exploitation Committee has been working hard to create educational materials that can be used by law enforcement agencies statewide to help them better understand and combat this problem. Too often, seniors and their families are told that the exploitation is a "civil matter." When the wrongdoer has no assets, civil remedies are ineffective. In the coming year, we will be working to introduce legislation to amend Florida law and give state attorneys the tools they say are needed to more effectively prosecute these cases. The ANE Committee is always looking for members, and the Legislative Committee will be seeking your help during the legislative process.

Message from the chair

John S. Clardy III

The section's Unlicensed Practice of Law Committee has likewise been active. The rise in non-attorney planners who see Florida's seniors as an "untapped market" to sell unsuitable financial products under the guise of benefits planning is disturbing. The committee has been successful in seeking an Advisory Opinion from The Florida Bar as to what is and is not the practice of law in public benefits planning. As you encounter these situations in your area, the UPL Committee and the section will be there to help you be a good advocate for your client.

Tied closely to the UPL issue is our section's effort to work with the Department of Children and Families to ensure that legitimate planning options allowable under state and federal law are not being abused. This opportunity has developed due to the dedicated efforts of several of our members. Over the coming year, the section will be working to ensure the state understands the role of elder law attorneys, and if changes to eligibility requirements occur, our clients' voices are heard.

Another issue on many of our minds is the state's transition of the Medicaid program to managed care organizations. Beginning in Central Florida, the state will transfer the administration of Medicaid to these private organizations, service area by service area. The section will be working very hard to keep our members updated as these changes happen. As an elder law attorney, your feedback on both problems and successes your clients encounter will allow the section to advocate for the protection of our clients' rights on a statewide level in the face of tight budgets and pressures to reduce health care spending.

The coming year will be an exciting time to practice elder law. As our clients face changing rules, unregulated planners and those who would abuse and exploit them, providing competent, professional and impartial advice is more important than ever. Your Elder Law Section is here to support you. Get involved today!

Correction

The author's biography that ran with the article "Understanding the 60-Day Transition Rule" in the Spring 2013 edition of *The Advocate* was out-of-date. It should have read:

Leonard E. Mondschein, Esq., *is past chair of the Elder Law Section of The Florida Bar. He is board certified in elder law and in wills, trusts and estates. He is a Certified Elder Law Attorney (CELA) by the National Elder Law Foundation. He serves as chair of the Practice Success Section of NAELA. He is a member of the Council of Advanced Practitioners (CAP). He writes this article on behalf of the Unauthorized Practice of Law Committee and the Public Policy Task Force.*

Message from the immediate past chair:

Thankful for our learned professionals

by Twyla L. Sketchley

Twyla L. Sketchley

I am a member of a dignified, honorable, learned profession. I spent the past year at the helm of the organization that represents this learned profession. We hear that as lawyers we are part of a profession and we should adhere to standards of professionalism representative of the law. However, as this past year has shown, elder law attorneys are not just members of the legal profession; we are part of a learned profession. A learned profession is one that requires highly advanced learning and high principles. Over the past year, I have had a sky view of this learned profession, and it has made me so proud to be called an elder law attorney.

At the beginning of my tenure, the Elder Law Section was struggling to make The Florida Bar understand the necessity of an Advisory Opinion defining what constitutes the unlicensed practice of law (UPL) in Medicaid planning to help prevent the victimization of Florida's most vulnerable elders. The ELS was also trying to convince The Florida Bar to allow the section to change its name to be more representative of the practice that elder law represents. In addition, the section was working with state legislators to amend the abuse, neglect and exploitation statutes to better protect Florida's elderly and disabled citizens. While the section was unsuccessful in changing its name, it did convince The Florida Bar that an Advisory Opinion should be issued defining what constitutes UPL in Medicaid planning.

As the year progressed, elder law attorneys were called upon to combat attempts by the Legislature to severely restrict planning tools like personal service contracts for family members and "spousal refusal" that support Florida's fragile families. Legislators proposed that family members paid to provide care for elders should be paid only minimum wage and could not be paid for services the state determined were done out of consideration for the person receiving the services. Elder law attorneys spent hours researching, writing and advocating to protect Florida's families, already suffering the financial devastation associated with the BP oil spill and the recession, who are caring for Florida's elders. Elder law attorneys also fought to ensure that elders did not have to turn to divorce to ensure appropriate care was provided for a spouse without financially destroying their own ability to care for themselves. Through these efforts, Florida's elders can still pay family members to provide care, and marital arrangements are still respected.

Elder law attorneys also worked with the Department Children and Families (DCF) to resolve the problems with the ACCESS public benefits application system. When the problems were brought to DCF, the online system was fraught with use issues, and the toll-free call center was nearly impossible to reach. Through the volunteer efforts, elder law attorneys helped DCF improve Florida's online public benefits application system. The call center's answer rate has also improved. Through the efforts of elder law attorneys, the section now has a bridge with the DCF's information technology department through which additional problems can be addressed in the future.

Throughout the year, elder law attorneys also advocated for consumer protections in the new statewide Medicaid managed care long-term care waiver. Elder law attorneys researched and evaluated the proposed contracts between the state of Florida and the seven managed care organizations that will be providing Medicaid services to Florida's elders through the new waiver. Elder law attorneys, in cooperation with other statewide stakeholders, offered comments and suggestions for improvements to those contracts. Elder law attorneys provided comments to the Centers for Medicare and Medicaid Services (CMS) on various aspects of the waiver's implementation and monitored the progress of managed care organizations acquiring providers to populate managed care networks.

Elder law attorneys also partnered with the Florida Office of the Attorney General to provide comprehensive abuse, neglect and exploitation training for law enforcement, state attorneys and attorneys. This training was designed to assist law enforcement investigating and prosecutors prosecuting abuse, neglect and exploitation cases. The training brought elder law attorneys together with adult protective service investigators, law enforcement officers and state attorneys to share information, to get a global picture of the victims and the systems designed to help them and to find new ways to protect Florida's vulnerable adults.

Elder law attorneys also spent countless hours this year mentoring, researching, writing and presenting continuing education and articles. The Annual Update and Review and the Essentials of Elder Law programs presented in Orlando in January were the best presented and well attended programs in the section's history. The articles published in this year's *The Elder Law Advocate* were some of the best I have seen since I started reading it more than a decade ago. Elder

law attorneys mentored the section through the Tricks of the Trade calls and individually at meetings, via email and in person. These activities raise the quality of every attorney's practice as well as the collective competence of the elder law practice.

As the year drew to a close, elder law attorneys built a working relationship with DCF. The cooperation between DCF and the volunteer attorneys helped educate DCF on the negative impact of UPL in Medicaid planning. This education resulted in DCF issuing guidance to its case workers on what constitutes UPL. As part of this on-going working relationship, elder law attorneys will help develop rules that protect Florida's elders in the Medicaid process while appropriately regulating certain planning tools such as personal service contracts and spousal refusal. Through this relationship, the volunteer elder law attorneys were given access to DCF transmittals so we can stay abreast of the developments as Medicaid reform is implemented throughout the state.

As the Elder Law Section's fiscal year closed, the Agency for Health Care Administration (AHCA) began notifying Medicaid recipients and applicants in Region 7 that they were being transitioned into the statewide Medicaid managed care long-term care waiver. Elder law attorneys prepared to address the problems that would come with the initial implementation of the waiver. They immediately began collecting information on providers and helping clients to understand the letters from AHCA that announced the mandatory transition to managed care Medicaid. And they began to work with other stakeholders to compile the information necessary to track any issues that would arise through the implementation process.

None of the elder law attorneys performing these duties were paid for their time, knowledge or services. These volunteer attorneys were motivated by high principles, a commitment to their profession and a dedication to making the lives of Florida's citizens better. All efforts required these attorneys to acquire advanced learning and expertise and to expend that for the betterment of more than themselves. The efforts of these attorneys have benefited both the elder law practice and Florida's most vulnerable citizens. Most of those who benefit will never know that the consumer protections, the protections for Florida's citizens and the improved access to public benefits were obtained by the members of this learned profession.

I am so thankful for having been allowed to chair the Elder Law Section and for the things I have learned this past year. As our new chair, John Clardy, takes over, I hope he has the same remarkable experience, and I wish him the best of luck (although John will need no luck, given his level of dedication and the dedication of those around him). I thank all the volunteers whose work made possible the achievements of the section this year.

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Call for papers – *Florida Bar Journal*

John S. Clardy III is the contact person for publications for the Executive Council of the Elder Law Section. Please email John at *clardy@tampabay.rr.com* for information on submitting elder law articles to The Florida Bar Journal for 2013-2014.

A summary of the requirements follows:

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

Review is usually completed in six weeks.

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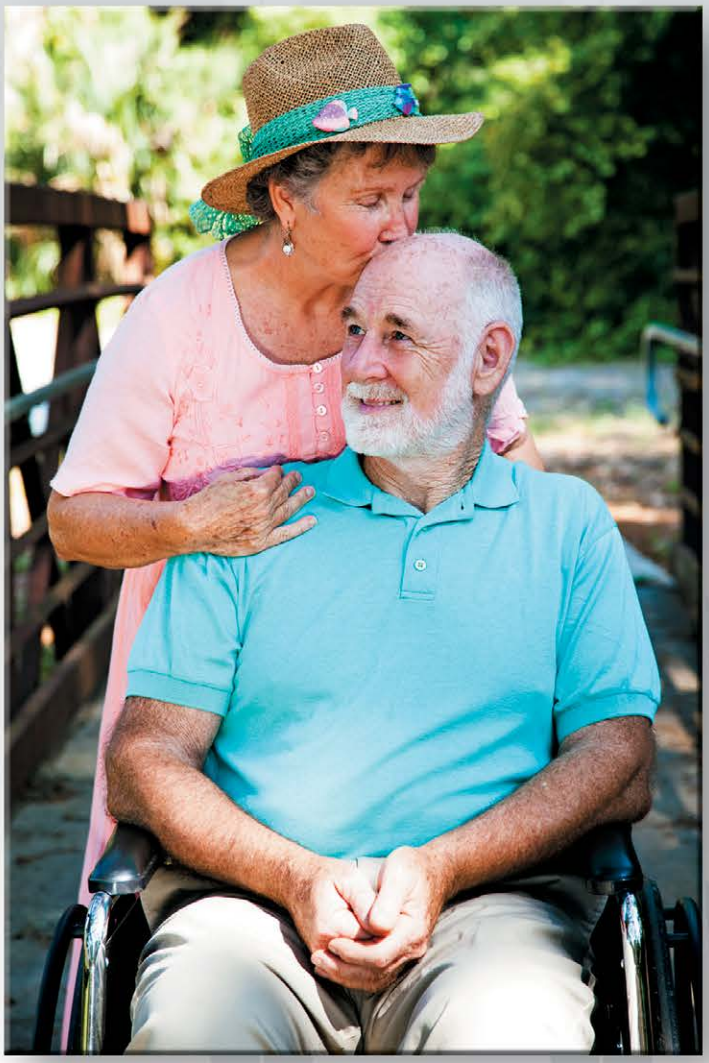

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ELS recognizes 2013 award winners and CLE program chairs

The Elder Law Section annually recognizes those who have made significant contributions to the section and to the profession of elder law. The following were honored during the Elder Law Section's Awards Luncheon during The Florida Bar Annual Convention at Boca Raton Resort & Club in Boca Raton on June 27, 2013.

Charlotte Brayer Public Service Award
John R. Frazier

Member of the Year
Leonard E. Mondschein

Lifetime Achievement Award
Charles F. Robinson
Joan Nelson Hook

Legislator of the Year, Florida Senate
Senator Eleanor Sobel

Legislator of the Year, Florida House of Representatives
Representative Elaine Schwartz

Representative Elaine Schwartz attended the event to accept an award for Senator Eleanor Sobel. She was surprised when Twyla Sketchley asked her to come up to accept the Representative of the Year award from the Elder Law Section.

Program Chairs, Essentials of Elder Law 2013
Brandon Arkin
Stephanie M. Villavicencio

Outgoing Chair Twyla Sketchley passed the gavel to incoming Chair John Clardy.

Twyla Sketchley, chair, presented the Charlotte Brayer Public Service Award to Largo attorney John Frazier in recognition of his advocacy for Florida's elderly.

Program Chairs, Elder Law Annual Update 2013
John S. Clardy III
Collett P. Small
Jason A. Wadell

Program chairs Brandon Arkin, Palm Beach Gardens, and Stephanie Villavicencio, Miami, were recognized for their work on the Essentials of Elder Law program in January 2013.

Leonard Mondschein, Miami, was presented the Member of the Year award by Chair Twyla Sketchley.

Left: As one of her last acts as chair, Twyla Sketchley wanted to recognize members who have dedicated their lives to helping the elderly and assisting their peers. Both Charlie Robinson, Clearwater (not pictured), and Joan Nelson Hook, New Port Richey, were awarded the Lifetime Achievement Award.

Right: Collett Small, Pembroke Pines, John Clardy, Crystal River, and Jason Wadell, Pensacola (not pictured), were recognized for their efforts as program chairs of the Elder Law Annual Update in January 2013.

FSU Estate Planning & Elder Law Society hosts luncheon

The Florida State University College of Law Estate Planning and Elder Law Society was pleased to have Charlee Taylor, a legal writing professor at FSU, and Twyla Sketchley, an elder law attorney in Tallahassee, as the featured speakers at its most recent meeting. Taylor gave an informative presentation about the courses a student who is interested in practicing elder law should enroll in and spoke about her personal interest in the field. Sketchley then spoke enthusiastically about her experiences as a solo practitioner, what she has learned from the many legal endeavors she has undertaken and the Elder Law Section's trip to Montana last August. The College of Law catered a Chick-Fil-A lunch for the event, and the Elder Law Section provided desserts from Food Glorious Food. After the presentation was over, students were given the opportunity to ask Sketchley and Taylor questions. The event was a success, and the students left with a heightened interest in a burgeoning field of law.

The Estate Planning and Elder Law Society is one of FSU College of Law's newest campus organizations, and the group is planning to hold many more events in the future. If you or someone you know would like to reach out to the organization, you may do so by contacting the society's president, Carter McMillan, at *epelsfsulaw@gmail.com*.

Lindsay Kushner, Ryan Abernethy, Charlee Taylor, Twyla Sketchley, Jessica Baker and Carter McMillan

THE FLORIDA BAR CLE

The Florida Bar Elder Law Section presents

Social Security – Hot Topics

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live Presentation: Wednesday, August 21, 2013
Marriott World Center • 8701 World Center Drive • Orlando, FL 32821
(407) 239-4200

Course No. 1751

7:30 a.m. – 8:00 a.m.
Late Registration

8:00 a.m. – 8:10 a.m.
Welcome and Introductions
Co-Moderators
Jana McConnaughhay, Esq., Chair-Elect, The Florida Bar Elder Law Section, Tallahassee, FL
Richard A. Culbertson, Esq., Law Office of Richard A. Culbertson, Orlando, FL

8:10 a.m. – 9:25 a.m.
Overview of Social Security Law: Know the Basics
Sara Bohr, Author, Attorney and Former President National Organization of Social Security Claimants' Representatives, Bohr & Harrington, LLC, Atlantic Beach, FL

9:25 a.m. – 10:10 a.m.
Handling a Fibromyalgia Case
Evan A. Zagoria, Esq., Liberman & Zagoria, P.A., Miami, FL

10:10 a.m. – 10:25 a.m.
Break
Sponsored by Guardian Pooled Trust

10:25 a.m. – 11:25 a.m.
Update on Social Security
Nancy Shor, Executive Director National Organization of Social Security Claimant's Representatives, Englewood Cliffs, NJ

11:25 a.m. – 12:25 p.m.
10 Questions You Want Your Social Security Client to Answer Correctly
R. Michael Booker, Esq., Booker Law, Sylacauga, AL

12:25 p.m. – 1:25 p.m.
Lunch (on your own)

1:25 p.m. – 2:25 p.m.
Cross-Examination of the Vocational Expert in Social Security Disability Cases
R. Michael Booker, Esq., Booker Law, Sylacauga, AL

2:25 p.m. – 2:40 p.m.
Break

2:40 p.m. – 3:40 p.m.
Cross-Examining Medical Experts: What To Do When A Consultative Physician or a Claimant's Own Doctor Claims Malingering
Dorothy Clay Sims, Attorney and Author, Sims & Stakenborg, P.A., Ocala, FL

CLE CREDITS

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Ethics: 0.0 hours

CERTIFICATION PROGRAM
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Elder Law: 5.0 hours

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LOCATION:

ONE LOCATION:	(067) Marriott World Center	Orlando	(Wednesday, August 21, 2013)

REGISTRATION FEES:

- Member of the Elder Law Section: $175
- Non-section member: $225
- Full-time law college faculty or full-time law student: $112

To REGISTER or order course material, go to FLORIDABAR.ORG/CLE and search by course number 1751.

Tips for improving your legislative advocacy

by Twyla L. Sketchley

The 2013 Florida Legislative Session was busy for elder law attorneys. Everything from Medicaid eligibility to exploitation of vulnerable adults was subject to legislative actions. The legislative session in the coming year promises to be equally as busy. Due to the level of legislative activity involving Florida's elderly and persons with disabilities, elder law attorneys must become more active in the legislative process. The following is a list of tips that may improve your legislative advocacy.

1. Get to know your local state representative and state senator before the legislative session while they are at home in your area. Visit your local legislators between June and November at their district offices. Introduce yourself and let them know you have knowledge or expertise on issues related to the elderly and disabled citizens and you are willing to assist with any questions they may have concerning aging or disability issues.
2. Get to know the local state representative's and senator's office staff before the legislative session. Again, visit your legislators' staff in their district offices June through November. Offer to be a resource to them for any questions they may have concerning aging or disability issues.
3. Invite your local legislators as special guests or speakers to functions in which you are involved. Legislators need to stay in touch with their constituents and stay visible within their districts. Introductions help, and information on age-related and elder law issues will help your legislators have a better understanding of these issues when performing their legislative duties.
4. Know the legislative committees to which your representative and senator are assigned. Each legislative committee reviews, investigates and hears testimony regarding specific subject matter. Knowing the committees on which your legislators serve gives you an opportunity to provide them and their fellow committee members with valuable information pertinent to their assignments.
5. Attend your local legislative delegation meetings and submit testimony when relevant, even if they are not issues you are most passionate about advocating for or against. Relationships with legislators and staff members often are built by the exchange of trusted information. While you may be most passionate about age-related issues, you are likely to have knowledge or personal experience with issues in other areas and can provide your legislative delegation with valuable information. This exchange of information and help can be the basis of a trusting relationship that allows you to provide information on the issues you are most passionate about.
6. Get to know which of the Florida House and Senate committees hear proposed legislation regarding aging, public benefits, exploitation and protective services. Get to know who serves on those committees and how those committees function, including their meeting schedules and deadlines. This will allow you to target your communication with legislators when issues arise that you want to impact. It will also allow you the opportunity to provide relevant and appropriate live testimony.
7. Get to know the staff of legislative committees that hear proposed legislation regarding aging, public benefits, exploitation and protective services. Staffers are usually with committees for many years and develop expertise in particular areas. Talking to staff about issues can help staff members find solutions to potential problems and help you determine the issues the committee is addressing during a particular legislative session.
8. Participate in fund-raisers for your representative and senator. If you are really passionate and supportive of a legislator in your area and want to see him or her elected, hold a fund-raiser and introduce this legislator to your friends. While fund-raising for a legislator cannot buy you your legislator's vote (or at least it shouldn't), fund-raising is a way to support legislators that share your beliefs and support your causes.
9. Help your colleagues build relationships with their legislators and legislative staff members. As the cliché goes: We're all in the same boat. The more elder law attorneys that build relationships with their legislators, the more prominent age-related issues become. The more legislators know about age and disability-related issues, the more likely it is we can solve problems affecting Florida's most vulnerable citizens.

10. Build a network of colleagues who have relationships with their legislators across the state so when issues arise you can get additional help with particular matters and gather support for or against specific legislation.

While many people say that politics is only about the money (and money may be very important), I think solid, trustworthy relationships can have a bigger impact than money. It takes time and effort to build those relationships, so there is no reason to wait. Make an appointment today to meet with the legislators in your district.

Twyla L. Sketchley *is a Florida Bar board certified elder law attorney with The Sketchley Law Firm PA in Tallahassee. She is a member of The Florida Bar and the State Bar of Montana. She is the immediate past chair of the Elder Law Section. She serves on the Real Property Probate and Trust Law Guardianship Committee, the Florida Probate Rules Committee and the LOMAS Advisory Committee. She is the chair of the State Bar of Montana's Elderly Assistance Program and a member of the National Academy of Elder Law Attorneys. She received her J.D. degree in 2000 from the University of Montana School of Law. She received a B.A. from the University of Montana, majoring in English and minoring in Japanese language and culture. She is married to Nicholas Weilhammer, a member of the Elder Law Section.*

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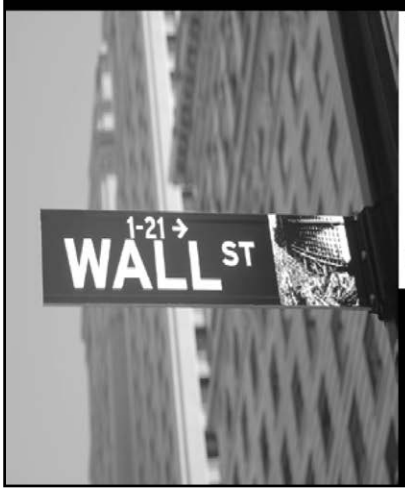

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West Palm Beach Marriott

Elder Law Section Retreat
November 8-9, 2013
The Plantation, Crystal River, Fla.

AFELA 2013 UnProgram
December 6-7, 2013
Hilton, Orlando

Elder Law Annual Update and Review
January 17-19, 2014
The B, Orlando

Mediation in guardianship

by Louis M. Hillman-Waller and Enrique Zamora

There are three distinct periods when mediation can be useful in guardianship cases. The first time mediation should be considered is before the filing of a petition to determine incapacity. At this point, mediation can give all parties involved the opportunity to avoid guardianship altogether. By bringing the parties to a mediation session, the family and/or friends of the alleged incapacitated person (AIP) can discuss alternatives to guardianship. This presupposes that the AIP is able to participate meaningfully in the mediation. If the diminished capacity of the AIP precludes him or her from understanding the options available and the need for making sure the AIP is protected, both the person and the property, then it might be too late for mediation to be successful.

The second period when mediation can be useful is before the incapacity hearing after a petition to determine incapacity has been filed. This is especially important when there is more than one petitioner seeking to be appointed guardian and/or there are documents in place, executed by the AIP, such as a durable power of attorney, a living trust and/or a health care surrogate designation, that could address the needs of the AIP.

It is important for the parties, and for the mediator, to realize who needs to attend a mediation held prior to the incapacity hearing but after a petition to determine incapacity has been filed. There will always be a court-appointed attorney for the AIP who must be present. It is required that he or she participate in the mediation to represent the interest of the AIP. For the mediation to be meaningful, the emergency temporary guardian (ETG), if one has been appointed, also needs to be in attendance.

Other necessary parties might include: 1) the spouse; 2) the children; 3) close relatives (in the absence of the first and second options); or 4) close friends (in the absence of the other three options). During this stage, some of the typical issues that can be resolved by mediation include the selection of a guardian, the validation of executed documents such as advance directives, the residence of the AIP and even visitation schedules. Keep in mind that separating the guardian of the person and the guardian of the property, or even having co-guardians appointed, could be a useful tool in reaching a mediated settlement. When the parties are unable to reach an agreement as to whom the guardian should be, it is also important to consider a professional guardian as an option, albeit a more expensive one.

The third period to consider mediation is after the incapacity proceedings and the appointment of a guardian. At this stage other issues may arise that could be ripe for mediation. Some examples come to mind, such as: 1) visitation conflicts; 2) level of care for the ward; 3) transfer of ward to another jurisdiction; 4) transfer of ward to another facility; and 5) estate planning concerns. The mediator should always inquire at this stage if the court-appointed attorney has been discharged, since in certain cases the appointment might continue after the initial plan is filed if the judge believes it will be in the best interest of the ward.

Confidentiality issues

After the filing of a petition to determine incapacity, the case proceeds in the Mental Health Division of the court. As such, all incapacity hearings are confidential. A mediation at this point ties in very nicely with these confidentiality provisions, since Florida Statutes Chapter § 44, specifically Chapter 44.401 et. seq. (the "Mediation Confidentiality and Privilege Act") would make the mediation confidential, but only under certain circumstances. F.S. 44.402 mandates that the mediation shall be confidential, if it is required by "Statute, Court Rule, Agency Rule or Order, oral or written case specific Court Order or Administrative Order, or it is being conducted by the express agreement of the parties attending." Further, if the mediation is conducted by a supreme court certified civil mediator, it is presumed that the Mediation Confidentiality and Privilege Act applies, unless the parties to the mediation agree not to be bound by it. It is therefore suggested that if the parties are intending to attend a voluntary mediation, they all execute a confidentiality agreement in accordance with F.S. 44.401, specifically agreeing that everything that is discussed will remain confidential.

The next obvious question is "Who is bound by these rules of confidentiality?" Once again, the statute provides guidance. F.S. 44.403 defines a mediation participant as "a party or a person who attends a mediation in person, by telephone, video conference or electronic means." And a party is "anyone who is participating directly or through a designated representative." In the realm of guardianship, the typical parties would be those set forth below.

There are exceptions to the confidentiality provisions of the statute, which are found in F.S. 44.405, but the specifics are beyond the scope of this article.

Typical issues in guardianship cases suitable for mediation

Certain issues often arise in a guardianship/incapacity mediation. These may include: 1) placement of the ward; 2) a recent change to an existing estate plan (due to the alleged undue influence on the AIP by an interloper, a family member or otherwise); 3) the possibility of

misappropriation of assets; 4) the holder of a durable power of attorney or even the trustee of a living trust; 5) a challenge to advance directives or an existing trust[1]; 6) a challenge to a recent marriage; and 7) the possibility of either an annulment or a divorce. In the case of a divorce, the agreement of the ward's spouse is required (F.S. 744.3725(6)).

Finally, mediation can be useful after a guardianship has been established and other issues arise, such as the removal of a guardian (due to alleged improprieties), visitation disputes, objections to annual accountings or end-of-life issues (refer to Probate Rule 5.900), all of which can lead to expensive litigation.

The proper parties in a guardianship mediation and potential conflicts

If the mediation is commenced after the filing of a petition to determine incapacity, the AIP must be represented by the court-appointed attorney, who is an advocate for the AIP and sometimes private counsel; counsel for the AIP must, within the limitations of the Rules Regulating The Florida Bar, represent the client to the best of his or her ability. (Specifically, Rule 1.4-4 provides that "counsel is expected to have as a normal relationship as possible notwithstanding the diminished capacity of the person.") Therefore, the court-appointed attorney will be an advocate for the AIP during any preguardian appointment mediation and sometimes even after the guardian has been appointed. In many cases, as previously stated, during this phase of the proceedings, there might be an emergency temporary guardian (ETG) who has been delegated some, if not all, of the delegable rights of the AIP. It is important to note that, even though the AIP has not been found to be incapacitated, if an ETG is appointed, the AIP has lost the power to exercise those rights that have been delegated to the ETG. The mediator must ascertain what rights have been given to the ETG and what rights the ward has retained, if any. It is also important to realize that the ETG has a duty to make decisions for the AIP based on the principle of substituted judgment. This principle requires the ETG to make the decisions the AIP would have made had he or she been able to make those decisions. Only in the case when the ETG is unable to establish what the AIP would have done had he or she been able to make the decision does the best interest rule come into play. The best interest rule requires the ETG to make a decision that, in the ETG's opinion, is in the best interest of the AIP. It is important to note that the attorney for the AIP and the ETG might be at odds during mediation because the attorney will have to be an advocate for what the AIP wants, which might not be, in the view of the ETG, what is in the best interest of the AIP.

In addition, the spouse of the AIP will be a proper party, as well as the children and perhaps other extended family, the trustee of any trust, the holder of a DPOA and the health care surrogate. Each case is unique, and Chapter 744 states that all interested parties ("those affected by the outcome of the proceedings," F.S. 731.201(21)) might be required to attend the mediation. Finally, it is important to remember that the judge is an integral part of the mediation. Even though he or she will not be present, the mediation agreement will be subject to the approval of the judge presiding over the incapacity proceedings.

Another scenario where additional parties, other than those mentioned above, would attend the mediation would be in the realm of a personal injury/wrongful death claim where a minor either suffered an injury or a minor is a survivor of a parent who was injured or died as a result of someone's negligence. In those cases the courts usually appoint a guardian ad litem to represent the interests of the minor or a ward, as the potential for a conflict can arise between the minor and the surviving natural guardian (i.e., the parent) or between the ward and the spouse. In those circumstances, the court-appointed guardian ad litem for the minor will be an essential party to the mediation as, without the guardian ad litem's consent and agreement, no settlement can be obtained.

What requires court approval after a petition for incapacity has been filed?

Unlike other lawsuits, once a petition to determine incapacity is filed, it cannot be dismissed. It must be heard, and upon the finding of incapacity, the judge is required, pursuant to F.S. 744.1012, to find the least restrictive alternative that will address the needs of the ward. Therefore, any settlement agreement must be approved by the court, after finding that the proposed agreement is the least restrictive alternative that can be implemented to address the needs of the ward. An option that might be available for discussion during mediation is a voluntary guardianship. A voluntary guardianship addresses only the financial needs of the ward, and presupposes that the ward is mentally competent but incapable of the care, custody and management of his or her property by reason of age or physical infirmity, and has voluntarily petitioned for the appointment of a voluntary guardian (F.S. 744.341(11)). Therefore, before a petition for voluntary guardian-

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Member News

Alex Cuello, Esq., principal shareholder of the Law Office of Alex Cuello PA in Miami, has been appointed to serve on the Elder Law Certification Committee by Eugene K. Pettis, president-elect of The Florida Bar. Cuello's service began on July 1, 2013.

ship can be filed, there has to be a determination by a physician that the ward is competent to understand the nature of the guardianship and the delegation of authority (F.S. 744.341 (0)). Voluntary guardianship also has the shortcoming that the ward can, at any time, change his or her mind and terminate the voluntary guardianship since it does not carry a finding of incapacity. A voluntary guardianship does not require that an examining committee render an opinion of incapacity as to the petitioner.

Typical failures in guardianship mediation

The issues that one encounters as a mediator in mediations involving a guardianship deal not only with those previously discussed above (whether or not a guardianship is required, whether it should be a voluntary guardianship and who the guardian should be), but they also involve complicated, long-standing family issues. These typically include sibling rivalry, disputes among children from a prior marriage and a subsequent spouse, as well as recent changes to estate plans by alleged interlopers.

It is usually believed that family mediations are some of the most complex, emotionally taxing and psychologically complicated cases that mediation attempts to resolve. Although this may be true, at the end of the day, there is not a blood relationship between spouses in a dissolution of marriage action. On the other hand, in guardianship, one of the most prevalent situations is two or more siblings fighting over who will be the guardian of the mother and/or the father. In all likelihood, both or all of the children believe that whoever is the guardian also controls the money. This could not be further from the truth. In guardianship, the money is actually controlled by the judge having jurisdiction over the case, more so in the counties where restricted accounts are required, such as Miami-Dade and Broward counties. Nevertheless, the mediator in these cases is required to be part psychologist and part confessor. The mediator must recognize that the deep-seated, long-standing rivalry between the siblings who are fighting over who will be the guardian of a parent usually stems from something that occurred many years earlier, sometimes as far back as childhood. Often there is a sibling who believes the other was "the favorite child," and it is now time to level the playing field. When this is coupled with a recent change by a parent to a long-standing estate plan that changes the distribution to favor one sibling to the detriment of the other(s), an untenable situation becomes catastrophic. The same scenario occurs if a parent changes any banking relationship to include just one sibling as beneficiary on a bank account(s). The distrust and animosity grow exponentially.

A different yet just as challenging mediation scenario is when you have children fighting against a subsequent spouse over the guardianship of the alleged incapacitated parent/spouse. This is especially true if the subsequent spouse was the perceived or actual cause of the divorce between the AIP and the other parent of the children. Even though the spouse may argue that he or she has preference, F.S. 744.312, subsection 2, states: "the Court shall give preference to the appointment of a person who: is related by **blood or marriage** to the Ward" (emphasis added). In the end, the court is still required to determine what is in the best interest of the AIP. There have been situations where, despite a marriage of many years, the court has not appointed the spouse as sole guardian of the AIP, but has appointed a child from a previous marriage as co-guardian. One can just imagine how smooth that guardianship will run. It still may be preferable to conduct the mediation at this point, since invariably, after the death of the AIP, either one of these scenarios will result in long, protracted and expensive litigation. Bear in mind that there are cases that because of the animosity among the parties, the judge ignores the blood or spousal relationship and appoints a professional guardian. This type of decision has been upheld in a least one case, *In re Guardianship of Stephens*, 965 So.2d 847,852 (FLA 2d DCA 2007).

Special issues in guardianship mediation

The right to apply for government benefits is one of the specific rights that can be removed from the ward and assigned to the guardian (F.S. 744.3215 (3)(c)). The issue of government benefits can become central in certain guardianship mediation cases. Considering that the average

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cost of a nursing home is approaching $8,000 per month, spouses and children alike might be concerned about the cost of caring for the ward and the need to pay for the expenses of the community spouse if the ward is a resident of a nursing home. In these cases, the mediator needs either to verify that the attorneys involved are familiar with government benefits planning or to bring in an experienced elder law attorney to assist the parties with these issues. Therefore, guardians must be careful in making sure the ward qualifies for whatever benefits are available, including the Institutional Care Program (ICP) for wards who are nursing home bound.

Conclusion

Mediations can be a wonderful tool to solve many issues that arise in guardianship. In some cases, mediation might help avoid guardianship altogether. However, the mediator must have some basic knowledge of this field. Unlike in most mediations, in a mediation about guardianship, a specialist such as an elder law practitioner might be advisable to help the mediator guide the parties to a settlement. In most cases, this will save the assets of the ward and perhaps allow the heirs to receive an inheritance that otherwise would have been spent on attorney's fees and expensive care of an elderly or disabled ward.

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Endnote:

1 § 744.331(6)(f), Fla. Stat. (2010).

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The end of the road: Senior drivers in the state of Florida

by Carla-Michelle Adams

The practice of elder law requires that practitioners constantly evaluate the changing capabilities and needs of their elderly clients. Practitioners will be expected to provide their opinions, assessments and recommendations on a wide range of issues that relate to the need and the ability of their clients to maintain independence and self-sufficiency. Practitioners may be consulted when family members, caregivers or friends question the ability of an elderly client to continue to maintain a driver license. The potential risk of serious collision and the possibility of a claim against the estate may prompt family members, medical professionals or other caregivers to encourage the practitioner to discuss the existence of such risk with the elderly client. It is important that elder law attorneys have a general understanding of the laws and the policies for license renewal requirements, reexamination and reevaluation of elderly drivers.

In the state of Florida, drivers over the age of 79 at the time of their license renewal are required to pass a vision test.[1] Additionally, the elder driver may be required to take a written examination.[2] The vision examination requires that the elderly driver meet the Florida Department of Highway Safety and Motor Vehicles' standard of 20/50 vision with the accepted minimum field of vision of 130 degrees.[3] The test can be administered at a driver license office, or the driver can have a medical professional such as an osteopathic doctor, an optometrist or a medical doctor perform the vision examination. If the driver passes the vision examination, he or she will be permitted to renew the driver license.[4] If the driver fails the vision examination, he or she will be referred to a vision specialist for completion of the Mature Vision Examination Form. The completed form will indicate whether the specialist believes the eyesight of the driver is sufficient to drive safely based on a full vision examination or whether a vision correction is recommended.[5]

Furthermore, a reevaluation of the driver's motor skills may be conducted after the vision examination has been completed. The reevaluation may be the result of a recommendation by a family member, medical personnel or a law officer; be based on the driving record of the applicant; or be reflective of a concern regarding a physical or a mental condition.[6] In terms of the ability of family members, friends or medical personnel to report a potentially unsafe driver, Florida Statute § 322.126 provides that "any physician, person, or agency having knowledge of any licensed driver's or applicant's mental or physical disability to drive … is authorized to report such knowledge to the Department of Highway Safety and Motor Vehicles … ."[7] The claim is provided to a medical disability specialist for screening and is then forwarded to an investigator. After the investigator makes contact with the driver and the investigation is complete, an assessment is made regarding the disposition of the claim. The driver may be required to submit a medical report from a physical examination, or the applicant may need to report to the department for re-testing. The examination can require a written test, a vision test and/or a driving test. Following examination, the hearing officer will determine whether there should be a modification in driving privileges. Restrictions that can be placed on the elder's driver license include but are not limited to:

- Requirement of eyeglasses, corrective contact lenses or telescopic lenses to be worn while driving
- Permitting driving only from sunrise to sunset
- Prohibiting driving during rush hour and/or freeway driving

It is important to reassure your client that age alone is insufficient grounds for denial, suspension or revocation of a driver license. Elder clients must be made aware of the requirements as set forth above and how those requirements will impact their ability to continue to have a valid license in the state of Florida. It is critical for clients to have a clear understanding of their rights and responsibilities in maintaining a valid driver license so they do not have the misconception that their age alone will preclude them from continuing to operate a motor vehicle. A balance must be struck between the need for independence, maintained through the ability to drive, and public safety. Elder law attorneys have the unique opportunity to function as the gatekeepers in assisting the Florida Department of Highway Safety and Motor Vehicles in protecting elder drivers from age discrimination in the license renewal process and in ensuring that proficient elderly drivers continue to exercise their ability to maintain a valid driver license.

Carla-Michelle Adams, Esq., *associate attorney at Newman Law Firm PA, was admitted to practice law in Florida in 2011. She received her B.A. from the College of New Rochelle, law degree from Florida Coastal School of Law and will complete her Master of Laws degree in elder law in May 2014 at Western New England University School of Law. She may be contacted at 904/355-8835 or carla.adams@newmanlawfirmpa.com.*

Endnotes:

1 Florida Department of Motor Vehicles, *Senior Drivers in Florida*, http://www.dmv.com/fl/florida/senior-drivers (last visited on May 25, 2013).

2 Id.

3 Id.

4 Id.

5 Id.

6 Id.

7 Fla. Stat. § 322.126

Don't let your kids' problems become your problems

by Jay D. Adkisson and A. Stephen Kotler

The court writes the introduction to this case:

> There is a popular perception among many elderly Americans that, in order to qualify for Medicaid and other public benefits, they should move assets out of their own names and into the names of their children. There are three serious problems inherent in such an asset transfer strategy. First, the federal statute governing Medicaid eligibility provides for a "look back" period of 36 months, or in the case of transfers to a trust 60 months, for persons who have transferred their assets for less than fair market value ... . Second, creditors of the transferor (the parent) might claim that the transfer was fraudulent, in derogation of their rights. Third, the creditors of the transferee (the son or the daughter) might claim that the assets have been irrevocably transferred by the parent, and are now available to satisfy their claims. Sadly, it is this last eventuality that has come to pass in this case.

Executive summary

A parent transfers to her child (the debtor in this case) the parent's life savings. Some eight years later, the child engages in complicated, but ill-fated, asset protection planning with a non-attorney planner using the money received from her parent. The debtor admitted to the court she made a fraudulent transfer, but argued the funds transferred were not hers and not part of the bankruptcy estate. The debtor's parent testified she never intended to make a gift to her child and at the same time stated she gave the money to her daughter to render herself eligible for Medicaid. Predictably, the court held for the bankruptcy trustee and against the transferee.

Facts

This is a Medicaid asset protection case as well as a fraudulent transfer case. The debtor is the daughter, and not Mom. This starts in fall 2002 with Mom, age 71, still working as a nursing assistant and living off of her income and approximately $200,000 left over from Dad's sale of his business before he passed.

Mom was not familiar with finances and had left those matters to her husband and now, Daughter. During Christmas time in 2002, Mom, an Arizona resident, while visiting Daughter, a Virginia resident, was introduced by Daughter to a representative of Merrill Lynch who set up an account in Daughter's name, not Mom's, using Daughter's social security number though it was Mom's money deposited into the account. The account was set up TOD Mom as to 99 percent in case Daughter died. Mom was not a signer on the account, but she did have a debit card to access the funds. Daughter paid the taxes attributable to income from the account and at least once reimbursed herself from the account for the taxes she had paid.

Was this a gift to Daughter? Not according to Mom, who was "adamant in her testimony" that she did not intend to make a gift of the funds to her daughter. She testified that she wanted to protect the funds from "scammers," who would seek to cheat her out of the money, and that she put the money in her daughter's name to protect it. Mom also testified that it was her understanding that she could not have assets in her own name in order to be eligible for Medicaid and other public benefits, should there come a time when she needed such benefits.

Fast-forward to 2009 after the stock market tanked. Daughter and Mom, now unhappy with Merrill Lynch, decide to move their account. Daughter took it upon herself to find a top-tier estate planning vehicle to hold the account—by searching the internet.

Daughter finally settled on a planner by the name of Rocco Beatrice of Estate Street Partners LLC in Boston. They were engaged to provide their "complete and integrated Ultra Trust package for the protection of [her] assets, for the fixed fee of $18,828." The Estate Street Partners' engagement letter agreed to provide an "Ultra Trust—Financial Instrument for your Mother's home & vehicles" as well as "Financial Instrument for your brokerage." The letter further stated, in bold italics:

> Financial Instrument avoids creditor claims of fraudulent conveyance and civil conspiracy to divest yourself of valuable assets, and avoids IRS trigger for a taxable transaction.

In April 2010, attorney John F. Libertine sent the Ultra Trust and related documents to Mom, in care of Daughter, with a cover letter that summarized a purpose of the Ultra Trust:

> For Asset Protection purposes, this Trust has been designed to reduce creditor risk, eliminate probate, and eliminate the estate tax.

Mom signed the document creating the LNDP&G Ultra Trust, and both Mom and Daughter signed a "Private Annuity Exercisable On Demand" and "Financial Instrument Private Annuity Agreement." Mom independently signed a document called the "Roadmap," which summarized the transactions, and also a deed transferring her home into the Ultra Trust. Within a few days, Daughter transferred $142,742, constituting what was left of the Merrill Lynch account, to the Ultra Trust.

Mom later testified that she did not view the Ultra Trust as an

investment, but rather wanted to protect the money until she died. Further, Mom testified, and Daughter agreed, that they believed Daughter could not access the money until Daughter reached age 75.

With a name like "Ultra Trust," how could things possibly go wrong? Well, let's see.

Daughter had an investment property with a balloon mortgage, whose interest rates soon took to the stratosphere, while the value of the property made like the Hindenburg. Unable to refinance, a common occurrence, Daughter's bankruptcy soon followed in February 2011. A trustee was appointed, and in November 2011, the trustee filed a fraudulent transfer action to recover the $142,742.
Here, the court relates that:

> The Defendants do not dispute that the transfer of the $142,742 to the LNDP & G Ultra Trust was a fraudulent transfer under Section 548(a)(1)(A) and (B) of the Bankruptcy Code. In this, they are well advised. The Ultra Trust and related documents are vague, confusing, verbose and internally inconsistent. They plainly were designed for the purpose of protecting assets from creditors.

Instead, Mom argued that she transferred the $142,742 to Daughter in trust for Mom's own benefit, and that Daughter held the money only as an effective trustee and not in Daughter's personal name. Therefore, according to Mom's argument, the $142,742 was never part of Daughter's bankruptcy estate.

The court rejected this argument, noting that when Mom originally transferred the money to the Merrill Lynch account, that money became simply Daughter's money, because Daughter had access to the funds at any time and could change the beneficiary designation on the account to delete Mom. There was no evidence presented to the court that there was any manifestation of intent that Mom retained an equitable interest in the funds at the time they were deposited with the Merrill Lynch account in 2002.

This reduced Mom to finally making what amounted to a "totality of the circumstances" argument, i.e., all the facts taken together indicated that the money was to be held in trust for Mom's benefit, and that therefore Mom retained the beneficial interest in the money. The court was not convinced:

> After all, they argue, why would a woman who was advancing in years, nearing retirement and working for an hourly wage, give the entirety of her retirement nest egg to her daughter? The answer lies in [Mom's] own testimony—she wanted to remove the funds from her own name and place them into the name of her daughter, in order to be eligible for Medicaid and other publicly available benefits, should the need arise. [Mom] can't have it both ways—she can't part with title for purposes of Medicaid eligibility, and at the same time claim that she retained an equitable title to the asset. To allow this kind of secret reservation of equitable title would be to sanction Medicaid fraud.
>
> Moreover, the nature of the Private Annuity compels the conclusion that the funds are those of [Daughter]. If, as asserted by the Defendants, the funds were held in trust for [Mom], then [Daughter] would have had fiduciary duties to her mother, for the preservation and prudent investment of the funds for her mother's benefit … . Yet, [Daughter] spent the entire corpus of this supposed trust, $147,742, to purchase an annuity for her own benefit … . [Daughter] testified that the annuity would be purchased only when her mother passed away, but this is not what the Private Annuity Agreement says. It provided that the Consideration ($142,742) was to be paid "no later than September 15, 2011 …

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> The fact that the Annuity is for [Daughter's] sole benefit, and not that of her mother, leads the Court to conclude that [Daughter] owned the beneficial interest in the funds at the time of the transfer to the Ultra Trust.

Here, the terms of the private annuity agreement really backfired on Mom. Though the Ultra Trust trustee had discretion to make distributions to the beneficiaries, the Ultra Trust could not make any distributions to Mom (or any other beneficiary) if they endangered its ability to make payments on the private annuity to Daughter. While Mom and Daughter testified that the money would be available to fund Mom's retirement, with Daughter receiving the remainder, the plain text of the documents provided otherwise.

And with that, the court held that the $142,742 was part of Daughter's bankruptcy estate, Mom had no interest since the time of transfer to Merrill Lynch in 2002 and entered judgment against the Ultra Trust and its trustee for that amount.

Commentary

If one executes documents that change ownership to someone else in fee simple absolute and without reservations, it will likely be effective for all purposes, good and bad. Judges are not impressed by litigants, such as Mom here, who show up and claim that while the documents say one thing, they really meant something else altogether.

One occasionally sees this in asset protection planning where a high-risk professional transfers assets to a spouse against the possibility of a negligence lawsuit. The marriage then sours, and the professional shows up in court trying to argue that the transfers were all just a sham to defraud creditors, such that the court should ignore the planning for the completely different circumstance of a divorce. This argument is, as here, a loser.

This case is no more than a slight variation of the give-it-to-the-spouse case. Instead of a spouse, we have Daughter. Instead of a professional negligence creditor, we have Medicaid. At the end of the day, we have a debtor claiming that she still owns the asset except as to her creditors. It's an old lesson, often repeated and apparently never learned.

While this case eventually turns on a bankruptcy fraudulent transfer issue, the court has an obvious distaste for Mom's transparent desire to cheat Medicaid, by claiming in the future that she didn't own the money given to Daughter. Medicaid planning—to the extent that it can be done—is a very specialized area of planning that is best left to those long experienced in the area.

Mom could have created a third party spendthrift trust for the benefit of Daughter in 2002, and she would have been home free. Mom and Daughter would have been protected from Daughter's creditors, the trust would not be a countable resource for Medicaid financial eligibility and five years after the transfer, Mom would have been outside the look back period for non-compensated transfers.

In 2002, when Mom originally made the transfer, the look back period was 60 months for transfers in trust, but only 36 months for transfers not in trust. After DRA 2007 became effective, the look back period is 60 months regardless of how the transfer is made, so there is less compulsion to not implement a trust. We are guessing Mom wanted to play the shorter route and chose an outright transfer, assuming she was even aware of the look back period.

Even if Mom was aware of the look back period, she obviously wasn't aware of—nor thinking about—the potential for Daughter to have creditors. There is not a week that goes by that we do not have the following conversation with a client and her child: "Can't my mom just give me the money? You want to make it so complicated. *No, she cannot just give you the money unless she wants your creditors to become her creditors.* But I don't have any creditors. *No, not today, but what about tomorrow or when you get divorced and your ex spouse is awarded Mom's money?*" The lack of planning in the case at hand did not blow up until almost nine years after it was set in motion, but then did so in a fashion that would have painted Los Alamos proud.

Asset protection planning is difficult and should only be done by a professional who is skilled in the area. Those who rely on financial planners or other non-attorneys for asset protection planning are likely to be sadly disappointed, not unlike some who rely on non-attorney Medicaid planners.

Looking for other business, whether getting more money under management or giving purported value-add to clients, there has lately been an influx of non-attorney planners into the asset protection sector, Medicaid planning and VA planning, notwithstanding that they are wholly unqualified to provide advice in this area and much of it likely constitutes the unauthorized practice of law, a felony in many states. Thus, Mom and Daughter originally went to Merrill Lynch, and not to an elder lawyer, and then to Rocco, the CPA, and not to an asset protection attorney, all with predictable results.

But let's move on to the "Ultra Trust." Here, we apply the Adkisson tried and true rule-of-thumb for advanced trust structures that are used for estate and asset protection planning: The more impressively a structure is named, the less likely it is to work.

This is not a flippant rule, but a practical one. Asset protection planning and Medicaid planning both require that a plan be custom-tailored to a client's particular circumstances, and usually much more so than even in ordinary estate planning.

A planning structure that purports to work for everybody probably works for nobody well. Persons (we can't call them "planners") who sell one-size-fits-all asset protection structures,

or invariably do the same thing for each and every one of their clients, are a type of scam artist of the same varietal of those who peddle living trusts as a cure-all. Plus, as here, a high falutin' name is likely either to annoy or amuse the court, and with negative consequences.

The court in this case put a good deal of emphasis on the attorney's stated purpose of the planning: "For Asset Protection purposes, this Trust has been designed to reduce creditor risk." It was a wholly gratuitous and unnecessary summary of the planning, with disastrous consequences. If one is looking for negative consequences, they need only to use the words "asset protection" or like terms in written communications and other documents. The term "asset protection" denotes planning that is done for the purpose of reducing the ability of creditors to collect against the assets. (If it is not that, then what is it?) This basically is an admission of the intent necessary to prove a fraudulent transfer; we only need a claim to make a fraudulent transfer case complete.

The lesson repeats, but continues to be ignored: There is no earthly reason to include the phrases "asset protection" or "protect your assets" in client communications, documents or whatever, but there is significant potential downside to using those terms. Planners who use those phrases in engagement letters or planning documents are doing themselves and their clients a disservice. It is fundamentally no different than using the words "tax shelter" in engagement letters and planning documents to describe the tax purpose of a transaction. Using the words "asset protection" might massage that planner's ego that such is what they are accomplishing, but it risks turning the planning into a self-fulfilling prophesy where that is the one thing that predictably will not happen if the structure is challenged by creditors.

According to the court, it certainly didn't help that the "Ultra Trust and related documents are vague, confusing, verbose and internally inconsistent."

On the elder law side, the same issues abound. We want to preserve assets for the use of the community spouse not in the institution so that they can continue to make ends meet and not also wind up on the public dole. These clients are generally couples who pay their bills and have the ability to and do live within their means until unplanned-for long-term care expenses blow a hole in the budget. The average annual cost of a semi-private room in a nursing home is $81,030. The average annual cost of an assisted living facility is $42,600, and for those who need memory care, $57,684. We often tell the children this is about preserving Mom's and Dad's money for their care and not about you getting an inheritance. Predictably, we do not see some of these children again.

Finally, one must also wonder whether giving a trust a trademarked trade name potentially causes unreasonable expectations by clients—after all, shouldn't an "Ultra Trust" by its name be the best trust in the whole world? Certainly, Mom and Daughter were caught by the name. The question is whether a jury evaluating a malpractice suit would hold a planner who marketed a trust structure to a higher standard of care commensurate with its name. Was the result achieved here what one would expect from an "Ultra Trust"? The lesson is that what might be a good idea from a marketing perspective might not be such a hot idea for a planner trying to defend the actual results.

At the end of the day, this is a case about honesty. Mom wanted access to her money, but she wanted to tell Medicaid that it wasn't her money anymore. After the court ruled that the money would go to Daughter's creditors, Mom was right.

Ironically, the simple rule to which this case can be distilled seems very much like a motherly rule: You can't have your cake and eat it, too.

Citation

In re Woodworth, 2013 WL 486669 (Bk.E.D.Va., Feb.6, 2013).

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Disclaimers and private agreements among beneficiaries

The tale: The three children of your recently deceased client have come to you with a problem. Mom's last will and testament has left a condominium to all three of them, per stirpes. However, the youngest sibling has lived in the condominium for the past 10 years. They have heard that if the two older siblings disclaim the property, then the youngest sibling can have it. They want you to "take care of it."

The tip: First of all, it is important for you to educate your client's children about disclaimers. Disclaimers are governed by the Internal Revenue Code (IRC) under Section 2518 and Florida Statute § 739.104. Under the IRC, a disclaimer is an irrevocable, unqualified refusal to accept an interest in property. The disclaimer has the following requirements: 1) it must be in writing; 2) it must be made within nine months of the creation of the interest; 3) the person disclaiming must not have accepted any of the benefits of the interest; and 4) *the interest must pass without any direction on the part of the person making the disclaimer.*

Similarly, under F.S. 739.104, the disclaimer must be: 1) in writing; 2) signed by the person making the disclaimer; 3) witnessed and acknowledged in the manner provided for deeds of real estate; and 4) delivered or filed as provided in F.S. 739.301.

F.S. 739.201(2) and (3)(a) go on to state that the disclaimed interest passes according to the instrument that created the interest or as if the disclaimant had died immediately before the interest was created.

The important lesson here is that the person disclaiming cannot direct who receives the interest in the property. In this case, a disclaimer by the two older siblings would leave two-thirds of the condominium to their own children. If all parties involved want the client's youngest child to receive the condominium, a disclaimer is not the proper tool.

However, you can recommend a different technique that is allowed under F.S. 733.815. This statute allows private contracts among interested parties. The beneficiaries can execute a written contract that alters the interests, shares or amounts to which they are entitled from the estate. In this manner they can be assured that the youngest sibling receives the entire interest in the condominium directly from the estate.

Tips & Tales

by Kara Evans

To alter the interests using F.S. 733.815, the beneficiaries must first execute a written contract detailing the agreement. The statute requires the personal representative to abide by the terms of the contact, subject to the PR's obligation to properly administer the estate. As a precaution, and to protect the personal representative, a copy of the contract, a petition to confirm and an order confirming the private agreement may be submitted to the court for approval.

Gift tax issues: While a properly executed disclaimer is not considered a transfer, an assignment or a release for gift tax purposes, a private agreement under F.S. 733.815 does not receive the same treatment. This type of transfer is done for convenience purposes only. For example, the condominium could just as easily be transferred to the youngest sibling by quit claim deeds executed by the older siblings. Our private agreement among beneficiaries eliminates that step. The older siblings are still treated as if they had gifted their interest in the condominium to their younger sibling and may be required to file a gift tax return if the value of their share was over the gift exclusion amount for the year.

If you would like samples of a private agreement among beneficiaries, a petition to confirm a private agreement among beneficiaries and an order confirming a private agreement among beneficiaries, feel free to send me an email requesting them at *kara@karaevansattorney.com*.

Kara Evans *is a sole practitioner with offices in Tampa, Lutz and Spring Hill, Fla. She is board certified in elder law and concentrates her practice in elder law, wills, trusts and estates. She is a member of the New York Bar Association and a member of The Florida Bar and The Florida Bar's Elder Law, and Real Property, Probate and Trust Law sections. She is a frequent lecturer for NBI and The Florida Bar at continuing legal education seminars. In 1980, she received her undergraduate degree in political science from the University of Florida and was awarded her J.D. degree from the University of Florida College of Law in 1983. In 1995, she received a Master of Science in taxation from Long Island University. She has lived in Central America and the Caribbean, where she acted as a tax consultant to Americans living overseas.*

Guardianship Committee

Sponsored by Wells Fargo
Carolyn Landon and Melissa Barnhardt, co-chairs

Removal of the right to bear arms

Unfortunately we did not have a sponsor for this bill in the Florida House or Senate as it took some time to get the approval to proceed from The Florida Bar. We are going to canvas local representatives and call on our members to try to gain personal contacts and support for the next session (similar to what we did on the personal service contracts). In addition, we made contact with NAELA, and David Hook sent the white paper and proposed legislation. NAELA may end up supporting the bill along with us, which would provide extra support for our efforts.

Administrative order for the 9th Circuit

This year we went through the original administrative order, and then we joined on to the RPPTL's petition to the Supreme Court's rule review committee, arguing that it was not an administrative order, but a rule. Judge Perry responded, and we provided additional comments in a reply. Judge Perry is very busy, and nothing has been done to push it through as a local rule at this point. Fees are not being struck down at the moment, but there is a delay in getting fees approved. If anyone knows of any orders entered on fees that are inappropriate, please let our committee know so we can consider an appeal.

Shen case

We discussed the hearsay issue of the case, and in Broward County they are allowing telephonic appearances of the examining committee members. Many members commented that they subpoena doctors to testify if needed in Palm Beach County, although that is not common practice in Broward. Concerns were raised that most doctors require a fee prior to agreeing to come to court. *Rothman* was also discussed as well as the ability to strike a report as a remedy if the report is insufficient. (We also need to look at the *Roland* case.) We discussed defining the way that we as a committee/section can complain about the examining committee reports (or determine a way to implement changes to the reports themselves, although they vary from committee to committee), and we determined that approaching the judiciary would be an appropriate course of action (and possibly additional education of committee members). There is also always the concern about the pay to the examining committee members.

We reviewed the bullet points regarding 744.331(4), F.S., at the request of Enrique Zamora (subcommittee formed under the RPPTL Guardianship Committee of which Enrique is a member) and provided comments in writing to the group for its consideration.

UPL Committee

John R. Frazier, chair

The UPL Committee petitioned The Florida Bar UPL Standing Committee to issue a proposed Florida Supreme Court Advisory Opinion to address the conduct of the non-attorney Medicaid planners. On Feb. 22, 2013, the Bar Standing Committee held a public hearing in Tampa regarding the matter. A number of Florida elder law attorneys attended the hearing and provided testimony. The public hearing was covered by several Tampa Bay Area news media organizations, including Bay News 9, the *Tampa Bay Times* and *The Tampa Tribune*. Shortly after the hearing, The Florida Bar Standing Committee voted to issue the proposed Advisory Opinion. The UPL Committee will continue to update the ELS Executive Council as things develop.

A primary goal of the UPL Committee is to increase and maintain awareness of the UPL problem, both to attorneys and the public. Since The Florida Bar 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 UPL Committee to encourage and facilitate the filing of UPL complaints with The Florida Bar.

Our committee holds a monthly teleconference on the third Tuesday of every month at 4 p.m.

Task force members & DCF legal counsel work together for Florida's elders

During the 2013 Legislative Session, Senator Eleanor Sobel held a stakeholders' meeting on personal service contracts and spousal refusal legislation. At that stakeholders' meeting, Senator Sobel and Senator Greg Evers asked elder law attorneys and the Department of Children and Families (DCF) to work together to resolve the issues related to the proposed legislation. On behalf of the Florida Public Policy Task Force, Emma Hemness, a past chair of the Elder Law Section, and Twyla Sketchley, then chair of the Elder Law Section, met with Herschel Minnis, assistant general counsel at DCF, and developed a plan for continued cooperation on those issues and many others.

One of the first issues addressed was the unlicensed practice of law and its

continued, next page

Work together for elders
from preceding page

negative impact on Florida's seniors. DCF immediately released a transmittal to its caseworkers reminding them of what constitutes the unlicensed practice of law. That transmittal is published on page 26 and will be posted on the Elder Law Section's website, *www.eldersection.org.*

As this cooperation continues, Hemness, Sketchley and Minnis will be working to develop rules regarding the use of personal service contracts and spousal refusal, looking at ways DCF and elder law attorneys can work together to combat the exploitation of the elderly in Medicaid planning and seeking ways to help the State shore up the Medicaid budget.

It is only through the ongoing dialogue of task force members such as Emma Hemness and Twyla Sketchley that we can continue to maintain a cooperative environment that benefits both Florida's elderly and persons with disabilities and Florida elder law attorneys. The task force is a joint effort between the Elder Law Section and the Academy of Florida Elder Law Attorneys. It is funded by contributions from elder law attorneys throughout Florida and is supported by volunteer efforts like those described above. To become a task force contributor, visit *www.afela.org*.

TFB UPL Standing Committee votes in favor of Medicaid planning Advisory Opinion

by John R. Frazier

The Florida Bar UPL Standing Committee held a hearing in Tampa on Feb. 22, 2013, to consider the issuance of a proposed Advisory Opinion to address the activities of non-attorney Medicaid planners in Florida. The following attorneys were present on behalf of The Florida Bar Elder Law Section: Jill Burzynski, Roberta Flowers, John Frazier, Emma Hemness, Gerald Hemness, David Hook, Joan Nelson Hook, Rebecca Morgan, Ellen Morris, Beth Prather, Jack Rosenkranz, Twyla Sketchley, Nicholas Weilhammer, Beverly White and Amanda Wolf.

At the hearing, the following individuals gave testimony in favor of the proposed UPL Advisory Opinion: John Frazier, Emma Hemness, Gerald Hemness, Jack Rosenkranz and his client, Twyla Sketchley and a client of Jill Burzynski.

Non-attorney Medicaid planner Sonja Korbrin, owner of VIP Benefit Services, and her attorney, Jeff Brown, gave testimony opposed to the UPL Advisory Opinion.

Shortly after the conclusion of the UPL hearing, The Florida Bar UPL Standing Committee voted in favor of issuing the Medicaid planning Advisory Opinion. The Florida Bar Standing Committee is currently working on a draft of the proposed Advisory Opinion.

The Elder Law Section UPL Committee will continue to provide updates on the status of the proposed Medicaid planning UPL Advisory Opinion. The UPL hearing was covered in the news media by Bay News 9, the *Tampa Bay Times* and *The Tampa Tribune*. The Florida news network also interviewed me for a news broadcast picked up by affiliates around the state.

I would like to thank all members of the ELS UPL Committee for their work on the UPL Committee over the years. Several of our UPL Committee members submitted written testimony to The Florida Bar for the UPL hearing. Al Rothstein was instrumental in bringing the UPL hearing to the attention of Tampa Bay area news organizations. Len Mondschein also made significant contributions to the favorable outcome of this hearing, prior to the UPL hearing in Tampa.

I want to say a special thank you to everyone who personally attended the UPL hearing in Tampa, to everyone who gave testimony at the UPL hearing and to everyone who submitted written testimony for the UPL hearing. The collective efforts of everyone who attended the UPL hearing, and those who provided oral and written testimony, significantly helped in the favorable outcome of this hearing.

If you have any questions about the UPL hearing or Medicaid planning UPL issues in general, please contact me at 727/586-3306, ext. 104, or at *john@attypip.com*.

John R. Frazier, J.D., LL.M., *graduated cum laude from Hampden-Sydney College in Virginia with a B.A. in economics in 1986. He received his master's degree in business administration from Virginia Tech in 1994, graduated cum laude from the University of Toledo, College of Law in 1997 and received his LL.M. in taxation from the University of Florida, College of Law in 1998. He is licensed to practice law in both Florida and Georgia. He practices primarily in the fields of elder law, Medicaid planning, veterans benefits law, estate planning, asset protection, taxation and business organizations. He is admitted to practice before the United States Court of Appeals for Veterans Claims, and he is a member of the National Organization of Veterans Advocates. He is also a member of the National Academy of Elder Law Attorneys, the Academy of Florida Elder Law Attorneys and The Florida Bar Elder Law Section.*

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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State of Florida
Department of Children and Families

Rick Scott
Governor

David E. Wilkins
Secretary

DATE: July 1, 2013

TRANSMITTAL NO.: I-13-07-0009

TO: Economic Self-Sufficiency Operations Managers
Economic Self-Sufficiency Program Offices

FROM: Lawayne E. Salter, Chief, Program Policy **(Signature on File)**

SUBJECT: Unlicensed Practice of Law

This memorandum is to remind and caution staff about the unlicensed practice of law. In interactions and communications with customers, staff must refrain from engaging in any communication with customers that may be considered the practice of law.

Unlicensed practice of law may be defined as giving legal advice or counsel to the customer wherein the rights and property of the person receiving the advice might be affected. It could also be advising the customer how to create or change a document in a way that needs a lawyer's opinion about the effect or lawfulness of the change or the effect or lawfulness of the document after the change has been made

Two examples that may be considered the unlicensed practice of law are:

- Telling a customer a specific amount of money to be deposited into a qualified trust account or other trust or financial account, or
- Telling a customer how to spend down accumulated assets to qualify for Medicaid.

Staff **must not advise** customers or their representatives, either verbally or in writing, about actions to take in utilizing their resources and income. Staff may provide information on Medicaid eligibility policies and may refer customers to the Department's website for additional resources, such as the eligibility fact sheets.

If there are questions about what can be interpreted as the unlicensed practice of law, Regional offices should first contact their local regional attorneys. Questions about this memorandum can be referred to Carrie Sheffield at (850) 717-4138.

1317 Winewood Boulevard, Tallahassee, Florida 32399-0700

Mission: Protect the Vulnerable, Promote Strong and Economically Self-Sufficient Families, and Advance Personal and Family Recovery and Resiliency

Summary of selected case law

by Brandon Arkin

***Ruble v. Rinker Materials Corp.* (Fla., 2013)**

In *Capone v. Philip Morris USA, Inc.*, No. SC11-849 (Fla. June 13, 2013) (Capone II), the court held that when the injured party plaintiff in a personal injury action dies, the personal representative of the decedent's estate is not required to file a separate wrongful death action. Rather, the personal representative may be added as a party to the pending action and shall have a reasonable opportunity to file an amended pleading that alleges new claims and causes of action. Further, petitioner Ruble was entitled to relief on an additional, independent basis. Florida Rule of Civil Procedure 1.190, titled "Amended and Supplemental Pleadings," provides that "[a] party may amend a pleading once as a matter of course at any time before a responsive pleading is served." Fla. R. Civ. P. 1.190(a). In *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 563 (Fla. 2005), the court held that the right of a plaintiff under Rule 1.190(a) to amend a complaint once before the service of a responsive pleading is absolute, and a trial court has no discretion to deny such an amendment. The trial court improperly dismissed Ruble's amended complaint. Similarly, the Third District erred when it affirmed the order of the trial court.

***Martinez v. Cramer* (Fla. 4th DCA 2013)**

At issue is when a court must appoint counsel for an alleged incapacitated person if a court determines a guardian needs to be appointed on an emergency basis. We hold that counsel must be appointed at the same time the emergency temporary guardian is appointed. The trial court erred twice: once when it failed to appoint counsel for the ward when the guardian of the property filed the renewed petition for determination of incapacity and again when it failed to appoint the ward counsel when it appointed an emergency temporary guardian of the person. The guardian of the property argues that since no "summary proceeding" was held for the appointment of an emergency temporary guardian, no appointment of counsel is necessary. This argument elevates form over substance. The trial court's decision to appoint an emergency temporary guardian after hearing the evidence presented at the hearing on the temporary injunction converted the hearing into a "summary proceeding" for purposes of Section 744.3031(1). However, in light of counsel's representation at oral argument that the guardian's term as emergency temporary guardian was extended after counsel was appointed for the ward, we find the trial court's failure to appoint counsel for the ward does not rise to the level of reversible error.

***Patrowicz v. Wolff* (Fla. 2nd DCA 2013)**

Plaintiff Cynthia H. Wolff filed a notice of intent to subpoena third party records from defendant Patrowicz's attorney, Matthew A. Linde, pursuant to Florida Rule of Civil Procedure 1.351(b). The proposed subpoena sought the entire estate planning file relating to the decedent's estate, including correspondence, memoranda and notes. Patrowicz filed a timely written objection to the proposed subpoena. After a hearing on the objection, the trial court overruled it and authorized Wolff to issue the subpoena. Linde filed a written objection to the subpoena, and Wolff set the matter for a hearing. At the hearing, Linde argued that under Rule 1.351(c) his objection to the subpoena was self-executing and that the hearing was therefore improper because the matter should have proceeded instead to a deposition. Linde stated at the hearing that the basis for his objection was that the documents sought were protected by the attorney-client privilege. Wolff did not allege that any exception to the privilege applied. Without taking any evidence or argument as to whether the documents were actually privileged, the trial court overruled the objection and ordered Linde to produce all of the documents sought. A party claiming that documents sought by an opposing party are protected by the attorney-client privilege is entitled to have those documents reviewed in camera by the trial court prior to their disclosure. The failure to address whether a claimed privilege applies prior to ordering the disclosure of documents is a departure from the essential requirements of the law.

***Dennis v. Kline* (Fla. 4th DCA 2013)**

In 2011, Dianna Dennis, a beneficiary of a 1989 trust adopted a 27-year-old woman in Pennsylvania whom she had known since birth and treated like a daughter. The adoption impacted those who would inherit under the trust, so another beneficiary, Harriet Kline, brought suit in Florida seeking to modify the trust to exclude the adoptee as a potential beneficiary. The circuit court granted summary judgment, excluding the 27-year-old from becoming a beneficiary of the trust. The trial court granted Kline's motion for summary judgment, modifying the trust to exclude the adoptee "because including her as issue would defeat or substantially impair the accomplishment of a material purpose of Trust 'A' which was to require the corpus of this Trust to remain in [the Settlor's] family for generations to come." In so ruling, the trial court gleaned the settlor's intent from the

continued, next page

trust itself, since "[t]he terms of the Trust show plainly on their face that [the Settlor] intended … to … carefully restrict the descent of Trust 'A.'" Given such intent, the trial court found dispositive that there was "no evidence in the record to support any notion that [the settlor] anticipated that 13 years after his death (and 22 years after he executed the Trust) that children would seek to divert the remainder interest in Trust 'A' away from his other children."

Additionally, as an independent ground to grant the motion, the trial court stated that by not requiring notice to be given to financially interested parties, "the Pennsylvania adoption procedure is not sufficiently similar to Florida's to support a construct of the Trust that would treat the adult adoptee as a beneficiary." The parties disagreed about the legal status of adult adoptions in Florida. Florida probate statutes treat adopted persons, both young and adult, equally with their biological counterparts. Absent any provision to the contrary, where a trust is created and executed in Florida, the law presumes that the settlor expected Florida law to apply, and Florida law permits adult adoptions.

Finally, Dennis challenged the trial court's finding that Pennsylvania's adoption laws, due to lack of notice to financially interested parties, should not be given full faith and credit in Florida. In the case at hand, Pennsylvania's adoption statute procedurally differs from Florida law in that notice is not required to be given to financially interested parties. See 23 Pa. C.S.A. § 2713.

Section 63.182(2)(a), Florida Statutes (2011), sets the notice requirements for persons other than those "expressly entitled to be given notice of an adoption" under Chapter 63:

> [T]he interest that entitles a person to notice of an adoption must be direct, financial, and immediate, and the person must show that he or she will gain or lose by the direct legal operation and effect of the judgment. A showing of an indirect, inconsequential, or contingent interest is wholly inadequate, and a person with this indirect interest lacks standing to set aside a judgment of adoption.

Even under Florida's statute, Kline would not have been entitled to notice of the Pennsylvania adoption, since she did not stand to "gain or lose by the direct legal operation and effect of the judgment." Kline would be entitled to inherit a portion of Dennis's share upon Dennis's death only if Dennis is not survived by "issue" within the meaning of the trust. Kline's interest is thus "indirect, inconsequential, or contingent" within the meaning of the statute. The final judgment is reversed and remanded.

Brandon Arkin *practices elder law and family law in Palm Beach, Broward and Miami-Dade counties. He is co-chair of the Mentoring Committee and chair of the Law School Liaison Committee. If you have any questions, need a mentor or want to become a mentor, email him at brandon.arkin@gmail.com.*

Fair Hearings Reported

by Diana Coen Zolner

***Petitioner v. Respondent,* Appeal No. 09N-00089 (August 17, 2009)**

The 90-year-old petitioner had been a resident of the respondent nursing facility since February 2009. Medicare Part A paid for the petitioner's first 20 days at the nursing facility in full and for 20 percent of the next 80 days of her stay. After the initial 100 days, the petitioner was considered private pay. On May 14, 2009, the facility issued a nursing home transfer and discharge notice effective June 16, 2009. The reason for the transfer was noted as "your bill for services at this facility has not been paid after reasonable and appropriate notice to pay." The outstanding bill was approximately $28,000, and the nursing home proposed discharging the petitioner to her daughter's home.

At the hearing, the facility provided evidence that bills were mailed monthly by regular mail to the petitioner's daughter, along with other written communications, and multiple phone calls were made to discuss payment options. The petitioner's daughter admitted she received the monthly billing statements and the monies were due. However, she explained that upon the advice of counsel she did not make any payments to the facility because an application for Institutional Care Program (ICP) Medicaid was pending with the Department of Children and Families (DCF). The petitioner's monthly income was being used by her daughter to pay the petitioner's household expenses in the community. The Medicaid application was subsequently denied and another application was filed in June 2009. A verbal agreement was made between the facility and the petitioner's daughter that "upon Medicaid approval," the petitioner's daughter would "turn over" the petitioner's social security check to the facility and make arrangements to pay the balance. As of the date of the hearing, the second Medicaid application remained pending and no

determination of Medicaid eligibility had been made.

Federal regulations limit the reason for which Medicaid or Medicare certified nursing facilities may discharge a patient. Federal regulations at 42 C.F.R. § 483.12 state, in part:

> [t]he facility must permit each resident to remain on the facility, and not transfer or discharge the resident from the facility unless— … (v) [t]he resident has failed, after reasonable and appropriate notice to pay for (or to have paid under Medicare or Medicaid) a stay at the facility.

Federal regulations also require:

> [b]efore a facility transfers or discharges a resident, the facility must— … (i) Notify the resident and, if known, a family member or legal representative of the resident of the transfer or discharge and the reasons for the move in writing …
>
> The notice must be made by the facility at least 30 days before the resident is transferred or discharged. Under Florida Statutes 400.0255, the respondent facility clearly holds the burden of proof to show that it has satisfied the federal regulations by clear and convincing evidence.

The hearing officer determined there was no dispute the petitioner owed a balance to the facility, the facility had issued appropriate notice for payment and no payments had been made to the facility. As a result, the hearing officer concluded the facility's proposed discharge action was within federal guidelines and the facility's actions were affirmed.

Petitioner v. Respondent. **Appeal No. 11F-08633 (December 2011)**

The petitioner's daughter sought to have the petitioner's income available to pay a mortgage obligation due to an irrevocable trust. The trust included the real property and required the petitioner to make mortgage and other necessary payments on the home in return for her grandchildren's lump sum investment in the trust. In 1996, when the petitioner's daughter and her children moved in with the petitioner, $59,000 of the petitioner's minor grandchildren's money was used to establish a trust agreement to protect the grandchildren's investment and to provide a home for them. The real property was in the irrevocable trust, and the petitioner established herself and her daughter as trustees. The petitioner intended to provide for future expenses in connection with the residence and included this fact in the trust language. The petitioner's daughter had been paying the mortgage payments through a joint account owned by herself and the petitioner, and not by the trust. The petitioner's monthly retirement income went into this account.

The petitioner's daughter contended the trust was not set up to deceive the Department of Children and Families (DCF), because the petitioner was healthy in 1996 when the trust was created and the petitioner was not expected to go into a nursing home. The petitioner's daughter also believed she was entitled to use the petitioner's retirement income to pay the mortgage pursuant to the terms of the trust agreement. The trust stated, in part, that the petitioner was to use trust funds and her own funds "to entirely satisfy [the] mortgage presently encumbering the real property." The respondent agreed the irrevocable trust language did require the petitioner to pay the expenses of the home. However, the trust did not irrevocably assign the petitioner's income to the trust. Therefore, the petitioner still owned her income, making this situation no different from other situations without a trust where the homeowner goes into a nursing home and her income must be used to pay for her care. The respondent argued that because the bank account where the petitioner's retirement was deposited was not included in the trust, the retirement income was considered available and must be used toward the calculation of the petitioner's patient responsibility for ICP Medicaid eligibility.

The hearing officer considered the testimony, the evidence, the Code of Federal Regulations at Sections §§ 416.1123 and 416.1124, the department's Program Policy Manual, 165-22, and Fla. Admin. Code 65A-1.701 and determined: 1) the petitioner still owned the income because it was not part of the trust; 2) the evidence did not show the petitioner no longer had the legal ability to access her retirement income; and 3) according to the above authorities, the ICP Medicaid program does not recognize a deduction for mortgage payments or allow for an ICP eligible individual to continue to make mortgage payments once entering the nursing home, as in this situation. As a result, the petitioner's appeal was denied.

Petitioner v. Respondent, **Appeal No. 11F-02086 (June 27, 2011)**

The petitioner was seeking an increase in the community spouse allowance under ICP Medicaid. Including the spousal allowance from the petitioner, the community spouse's total gross monthly income was $2,541.97, and her continuing monthly expenses were $2,650. The community spouse did not dispute the correctness of the gross income figures used by the Department of Children and Families (DCF). However, she believed she should be allowed to keep a larger portion of her husband's income to maintain herself in the community. The monthly expenses she reported to DCF included rent, renter's insurance, electricity, phone, cable, car payment and insurance, medical insurance, food, life insurance premiums for herself and the institutionalized spouse, prescriptions, co-pays, personal items and back taxes owed to the IRS. The community spouse asserted she had approximately $100 in checking and no other assets/resources on which to rely. She further stated she was unable to pay the institutionalized spouse's patient responsibility at the nursing facility, and as a result, the institutionalized spouse faced possible discharge from the facility for failure to pay.

Florida Administrative Code 65A-1.712 allows either spouse to appeal

continued, next page

the post-eligibility amount of the income allowance through the Fair Hearing process. It further states that "the allowance may be adjusted by the hearing officer if the couple presents proof that exceptional circumstances resulting in significant inadequacy of the allowance to meet their needs exists." The Code gives an example of exceptional circumstances as "when a community spouse incurs unavoidable expenses for medical, remedial and other support services which impact the community spouse's ability to maintain themselves in the community and in amounts that they could not be expected to be paid from amounts already recognized for maintenance and/or amounts held in resources." Furthermore, the department's Policy Manual, 165-22, passage 2640.0119.04 states in part:

> [a]llowed expenses are limited to rent or mortgage payment (including principal and interest), taxes, insurance (homeowners or renters), maintenance charges if a condominium and mandatory homeowner's association fees, as well as the standard utility disregard which is limited to water, sewage, gas, and electric.

Based on the controlling authorities, the hearing officer concluded "the community spousal allowance may be adjusted if petitioner provides proof of exceptional circumstances that cause extreme financial distress resulting in the significant inadequacy of the allowance to meet her needs in the community." The hearing officer further concluded that exceptional circumstances are those that are "more rare than those that occur in everyday life, such as accidents and illnesses that result in personal harm or property damage" or unavoidable expenses for medical costs. Proof of such exceptional circumstances resulting in significant inadequacy of the allowance to meet the community spouse's needs was not shown, and therefore the community spouse was not eligible for any further income allowance from the petitioner.

***Petitioner v. Respondent*, Appeal No. 11F-8098 (December 2011)**

The petitioner appealed the respondent's intention to seek and establish a Medicaid overpayment claim. The overpayment of $26,377.67 was originally classified as client error because the petitioner omitted a portion of his retirement income on his application. However, the department, upon further review, discovered that although the income was not reported on the application, the petitioner had provided verification of the income for the case record during the application process. Therefore, the agency was aware of the income and amended its records to reflect the overpayment as agency error. At the time of the application, the petitioner's monthly income exceeded the income limit, and the petitioner should have been deemed ineligible to receive ICP Medicaid benefits, unless a qualified income trust (QIT) was established, funded each month and approved by the department's legal counsel. As a result of a portion of the petitioner's pension income being excluded from the budgeting process (by agency error), the petitioner was erroneously approved for ICP Medicaid benefits and the issue of needing to establish a QIT did not arise.

Florida Statutes 414.41, Recovery of payments made due to mistake or fraud, states in relevant part:

> (1) Whenever it becomes apparent that any person or provider has received any public assistance under this chapter to which she or he is not entitled, through either simple mistake or fraud on the part of the department or on the part of the recipient or participant, the department shall take all necessary steps to recover the overpayment …

After review of the testimony and the evidence, the hearing officer concluded that had the department correctly included all of the petitioner's pension income in its budgeting, it would have determined that his income exceeded the income limit and the petitioner would have been required to establish a QIT and to fund it monthly to meet the qualification requirements. Since no QIT was established, the hearing officer concluded an overpayment, due to agency error, had occurred. As a result, the hearing officer concluded the department was authorized to take the necessary steps to recover the overpayment, irrespective of who committed the error. Therefore, the respondent's actions to recover the overpayment claim were affirmed.

Diana Coen Zolner *graduated from Touro College, Jacob D. Fuchsburg Law Center in May 2001. After graduating law school, she worked as a prosecutor for the District Attorney, Suffolk County, New York, from 2001 to 2002. She then transitioned to private practice as an associate attorney, practicing in the areas of elder law, wills, trusts and estates from 2002 to 2008. In September 2008, she moved to Florida to enjoy the sunshine and began working as an associate attorney and continued to practice in the areas of wills, trusts and estates. She is currently employed as an associate attorney with Brandon Family Law Center LLC in Brandon, Fla.*

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