The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

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The Elder Law Advocate

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COVER ART

Teddy Bear Sunflower
Sarasota, Florida
Photo by Jennifer Weitze
Special Needs Lawyers PA

5/2015

Contents:

The deadline for the SUMMER 2015 EDITION is July 1, 2015. 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.

How we handle change

Jana McConnaughhay

Message from the chair

I am a pretty big fan of continuity. I live in the town I grew up in (and for that matter, the house I grew up in, since we purchased it from my parents). On any given day, I might see a junior prom date or a friend from Brownie Scouts. Some might find it claustrophobic, but I love the comfort of knowing a place and people and their patterns well.

Last week I went to high school orientation with our 14 year old, who is still a chubby toddler in my mind. Then our wonderful associate sadly announced that her husband is being transferred, and we are going to lose her. And as my year as chair flies by, I can already see the specter of immediate past chair looming. Even though I would pick comfortable patterns if I could, change comes, and comes constantly.

Our wonderful elder law practice is always changing, and we get the "fun" of constantly modifying what we know and how we practice as the laws and rules morph over the years. Our clients and our communities change, and we learn that we are wise to constantly work on and modify the ways that we reach both former and future clients, if we want to be successful. This is not a practice where we can rest on our laurels and act as experts, without constant learning and willingness to embrace change.

Our section takes a leadership role in making sure the interests of our clients and our members are considered as the march of change continues. We do so by involving ourselves at the national and state levels as changes are considered and made, sometimes with great chunks of our members' time.

This message is written during the legislative session, when big changes are being considered that would dramatically change our guardianship practices. Victoria Heuler and Carolyn Landon, co-chairs of our Guardian Committee, have been called upon to review proposed legislation from a number of legislators and to provide recommendations to our Legislative and Executive committees. They have done so with grace and good humor, despite the time this has taken away from their own busy practices. Scott Selis and William Johnson have dealt with these bills and many others as leaders of the Legislative Committee, which has also stepped up to make sure the Elder Law Section is at the forefront of issues impacting estate planning, guardianship and health care decision making. Their service is greatly appreciated.

One change that was not positive for our members was the proliferation of non-attorney Medicaid planners in our state, who oftentimes recommended products or plans that were harmful for the clients and their families. Under the leadership of past chair Leonard Mondschein, an effort was made to address the unlicensed practice of law as it pertained to Medicaid advice and planning. John Frazier, chair of the UPL Committee, took this issue and shepherded it for years. His work led to a decision by the Florida Supreme Court this year, which set forth, with specificity, those practices that are within the sole purview of licensed attorneys. This decision is already creating positive change for Florida's residents.

Our Joint Public Policy Task Force, made up of the section's immediate past chair, chair, chair-elect, substantive chair and administrative chair; representatives of AFELA; and others, meets every single Thursday for an hour, with the sole purpose of addressing changes and issues concerning our practice area and clients. The members of this task force, both current and past, have had and are continuing to have a huge impact on making the inevitable change positive for all of us.

Personally, I will learn to deal with having a high school child and the loss of a valued attorney in my firm. I will enjoy serving as immediate past chair under the leadership of now chair-elect David Hook. Professionally, I will always be grateful to the Elder Law Section and the grace with which it moves our membership through the ever-changing landscape of our practice.

Handwriting expert opinions can't make their mark alone

by Alex Cuello and Alexander J. Hernandez

The Florida Probate Code requires two witnesses to sign a will in the presence of the testator and each other in order to effectuate the validity of a will. The two witnesses' concurrent attestation may be their personal observation that the testator signed in their presence, that the testator acknowledged to them that he or she has previously signed the will or that another person, in the testator's presence and by the testator's direction, subscribed the testator's name to the will. When the authenticity of a testator's signature is raised as a defense in a will contest, it is common that the party challenging the validity of the will hire a handwriting expert. However, "a handwriting expert's testimony that a document was a forgery, standing alone, and without corroboration by circumstances indicative of forgery or fabrication, … [is] legally insufficient to overcome the testimony of unimpeached eyewitnesses." *Estate of Krugle v. Bobier*, 134 So.2d 860 (Fla. 2d DCA 1961).

In *Krugle*, the appellate court reversed the order revoking probate of the decedent's will on the uncorroborated testimony of a handwriting expert. The decedent's will was signed in the presence of two subscribing witnesses, both of whom testified at trial. The appellate court found that the attesting witnesses' disagreement about incidental features surrounding the execution of the will was not in itself impeachment of the witnesses' veracity. The handwriting expert's testimony was limited to an opinion that the decedent's signature on the will was a forgery. In rejecting the handwriting expert's opinion, the appellate court stressed that expert testimony is secondary evidence, or an opinion, which absent corroborating evidence of facts cannot be allowed to prevail over the uncontradicted and unimpeached testimony of two disinterested witnesses.

In *Dozier v. Smith*, 446 So.2d 1107 (Fla. 2d DCA 1984), the decedent had one daughter and seven siblings. The decedent had her brother-in-law, a practicing attorney, prepare her will wherein she left her entire estate to her sister who was married to the will preparer. The daughter petitioned to revoke probate of the will and was granted her petition. On appeal, the appellate court reversed with instruction to the trial court to deny the daughter's petition. The appellate court agreed that the circumstances surrounding the execution of the will were slightly unusual. The surrounding circumstances appeared to suggest undue influence, inconsistency of previous known values or overreaching. The only issues presented for trial, however, were the genuineness of the signature and statutory compliance in the execution of the will. At trial, the daughter offered no testimony to show that the requirements of § 732.502, Florida Statutes, were not met. Instead, the testimony of two handwriting experts was offered to demonstrate that the testator's signature was a forgery. One of the experts opined that the testator used a felt tip pen, which tends to hide the possibility of a forgery. The appellate court found that the trial court "misinterpreted the legal effect of the evidence as a whole" in revoking probate of the will. The testimony of the experts that the signature was a forgery did not address any of the circumstances surrounding the execution of the will.

In *Raulerson v. Metzenger,* 375 So. 2d 576 (Fla 5th DCA 1979), the decedent's conveyance of title to real property was challenged on the basis of incapacity and that the decedent's signature was forged. The decedent had allegedly conveyed title to her son immediately prior to her death. Shortly before the date of death, the decedent was placed in a nursing home. At trial, two witnesses and a notary testified that they personally witnessed the decedent sign the documents at issue. Also introduced at trial was the testimony of the nursing home's director of activities who testified that the decedent had an illness that caused her hands to shake uncontrollably. The decedent's signature on the conveying instrument, however, was absent any irregularities. At trial, a handwriting expert testified that the decedent's signature was a forgery, based in part on the lack of "irregularity of line quality in the challenged signature." The appellate court affirmed the trial court's acceptance of the expert witness's opinion and finding that the signature was a forgery. In so holding, the appellate court affirmed that the expert's opinion was "by inference corroborated by the evidence of the existence of the [decedent's] particular physical ailment." Notwithstanding the fact that three eye witnesses testified to having personally observed the decedent execute the document, the appellate court affirmed that the trial court had competent and substantial evidence to find that the circumstances surrounding the execution of the document supported the expert's opinion that the signature was a forgery.

A handwriting expert's testimony is considered by the court as secondary evidence, which absent direct evidence of sustained facts cannot prevail over eyewitness accounts of the circumstances surrounding the execution of a document. When retaining a handwriting expert to challenge a signature, it is critical

that the expert witness's opinion have supporting, competent and substantial evidence. Without such evidence, the expert's opinion will not survive direct evidence from eyewitness testimony to the contrary.

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Endnotes

[1] F.S. 732.502.

[2] *Id.*, (1)(b)2a.

[3] *Id.*, (1)(b)2b.

[4] *Dozier v. Smith*, 446 So.2d 1107 (Fla. 2d DCA 1984).

[5] *Raulerson v. Metzenger*, 375 So. 2d 576 (Fla. 5th DCA 1979).

[5] *Id.*

[6] *Id.*

Do you know what AFELA is?

by Emma Hemness

AFELA stands for the Academy of Florida Elder Law Attorneys. AFELA is the Florida state chapter of the national organization known as the National Academy of Elder Law Attorneys (NAELA). There are many other state chapters of NAELA around the nation. AFELA is one of the largest chapters. Membership in AFELA requires membership in NAELA and an adherence to its aspirational standards for professional behavior.

AFELA was founded in 1993 as a professional association of attorneys who are dedicated to improving the quality of legal services provided to the elderly. Currently it serves as the preeminent organization for private practice elder law attorneys in the state of Florida. Its primary focus is advanced-level education. The Academy offers several CLE in-person programs and web-based programs on a wide range of topics in the elder law concentration. One of its most lauded membership benefits is the AFELA listserv, which is an open forum for questions and answers among its members on nearly every elder law topic imaginable.

AFELA is often confused as being a part of The Florida Bar. It is not. Consequently, AFELA is separate from The Florida Bar's Elder Law Section, and it has its own board of directors and its own administrator. For example, if an elder law attorney in private practice wanted to join AFELA, the elder law attorney would not contact the Elder Law Section. Also, it is important to note that AFELA's membership is made up of only elder law attorneys in private practice. AFELA's members do not include judges, attorneys in any of Florida's government agencies or members of affiliate organizations.

Nearly all members of AFELA are members of the Elder Law Section, too. Although some could imagine that AFELA and the Elder Law Section would compete with each other, the Academy and the Elder Law Section share a unique and close working relationship. It is through this mutually beneficial relationship that the Joint Public Policy Task Force for the Elderly & Disabled was formed over 10 years ago to address concerns about administrative public policy and proposed legislation affecting the practice of elder law attorneys in Florida. The Task Force has a balanced membership, with four officers from each organization and five attorneys selected at large. Since it is a wholly volunteer-based group, it is the financial contributions made by AFELA and Elder Law Section members that allow advocacy to occur within administrative and legislative forums.

If you are an elder law attorney in private practice, we are interested in having you join the AFELA membership. For more information, you may contact our administrator, Jennifer Dooley, at *jennifer@afela.org* and view the AFELA website at *www.afela.org*.

Below is a listing of our upcoming educational programs. Please log on to the AFELA website (www.afela.org) for more information and to register.

2015 AFELA officers

Emma Hemness, president
Cary Moss, president-elect
Twyla Sketchley, secretary
Jill Burzynski, treasurer
Shannon Miller, immediate past president
Randy Bryan, board member
Gregory Glenn, board member
Ellen Morris, board member
Britton Swank, board member
Amanda Wolf, board member

Mark your calendar!

2015 AFELA educational programs

June 12 • 9 a.m.-4 p.m.
Mid Year UnProgram & Legislative Update
Hilton Orlando

August 12 • 12 noon
Webinar: Employee Handbook & Wage Issues – What You Need to Know
Presenter: Denise Wheeler, Esq.

November (Date TBA)
Webinar: Hiring, Firing & Other Fun Topics
Presenter: Christine Sensenig, Esq.

December 4-5
The UnProgram
Orlando

SECTION NEWS

Three ELS members receive TFB President's Pro Bono Service Award

The 2015 Pro Bono Service Awards ceremony was held on Jan. 29, 2015, at the Supreme Court of Florida. The annual Pro Bono Service Awards recognize outstanding commitment to providing legal services to Florida's poor.

The 2015 Pro Bono Service Awards ceremony at the Supreme Court of Florida
photo by Twyla Sketchley

The Florida Bar President's Pro Bono Service Award was established in 1981. Its purpose is twofold: "to further encourage lawyers to volunteer free legal services to the poor by recognizing those who make such public service commitments; and to communicate to the public some sense of the substantial volunteer services provided by Florida lawyers to those who cannot afford legal fees." This award recognizes individual lawyer service in each of Florida's specific judicial circuits.

The Elder Law Section is pleased to recognize three section members who received the prestigious TFB President's Pro Bono Service Award.

Michelle L. Farkas
8th Circuit
Gainesville

Michelle L. Farkas, who has a solo practice in Gainesville, didn't wait long to begin her pro bono work. After graduating from the University of Florida Levin College of Law and being admitted to The Florida Bar in 2006, she began volunteering with Three Rivers Legal Services in 2007.

She also hasn't shied away from taking on problematic cases and what her nomination called "eccentric and difficult clients."

Farkas understands the needs of people trying to get out of the cycle of poverty, and she recognizes that, as a lawyer, she has special expertise to offer her community.

A look at the pro bono cases that she has accepted underline the range of issues that pro bono work can entail as well as Farkas's ability to stick with the tough assignments.

She helped a rural resident with a will and also offered counseling on a prenuptial agreement and the difficulties caused by the couple's very limited incomes. She assisted an elderly couple with advance directives, as well as set up a special needs trust for an adult daughter, and even helped the couple as they transitioned into assisted living.

She worked on a dissolution-of-marriage case that was complicated by the woman's giving birth to children by a different father during the marriage, and she currently is helping a family that is trying to maintain tenancy in a home in foreclosure.

Finally, in a case that is ongoing as new legal issues and counseling needs arise, Farkas has been helping a client who has multiple health issues gain custody of her teenage grandchildren, after their mother passed away. But the case has had many complications: The children have two different biological fathers, the granddaughter became pregnant and a great-grandchild also has numerous medical conditions.

Farkas puts her whole heart into helping her clients, recognizing that their situations and poverty put them at a disadvantage in navigating the legal system. She finds satisfaction in seeing their needs met and even appreciates what she calls her own "tenacity" while working with some difficult situations.

In addition to this volunteer legal work, Farkas serves on the board of directors of the Mid-Florida Region of the Children's Home Society of Florida.

Andrew R. Boyer
12th Circuit
Sarasota

When he was 10 years old, Andrew R. Boyer traveled to Tallahassee with

continued, next page

Pro Bono Award
from preceding page

Elder Law Section members Sophia Lopez and Twyla Sketchley after the ceremony
photo by Elizabeth Ricci

his father, Edwin, who was to receive the 1994 Florida Bar President's Pro Bono Service Award. The Supreme Court justices let the boy sit on the bench, and his father explained the importance of helping those who cannot help themselves.

The experience made an impression. Today, Andrew Boyer is a recipient of the same honor for his pro bono service.

Boyer, who now practices with his father at Boyer and Boyer in Sarasota, was admitted to The Florida Bar in 2007 and has been volunteering for Legal Aid of Manasota since 2008. He has donated more than 330 hours of pro bono service, taking on everything from the drafting of countless wills and advance directives for elderly clients and terminally ill patients to complex guardianship cases.

In one case, a young woman who recently had lost her mother was trying to gain custody of her two younger sisters. Thanks to Boyer's efforts, the family was able to stay together.

Boyer's spirit of volunteerism extends beyond the courtroom. He mentors other attorneys who have accepted pro bono cases in his area of expertise—probate, guardianship and estate planning.

He was instrumental in organizing Florida's first "Wills for Heroes" event in 2010. Boyer trained volunteer attorneys, drafted forms and acted as a troubleshooter at the event, which provided free wills for first responders, including police, deputies, firefighters and paramedics. "Wills for Heroes" inspired "Wills for Helping Hands," also organized with help from Boyer, which offered free wills to the front-line staff of nonprofit organizations, including case workers and receptionists. More than 300 wills were prepared at these events.

Boyer also volunteers with Justice Teaching, an initiative created by Florida Supreme Court Justice R. Fred Lewis when he was chief justice. Justice Teaching educates students about the law and the justice system by pairing attorneys with elementary, middle and high school classes.

In a Young Lawyers Division profile of Boyer written in 2012, the Stetson University College of Law graduate said simply: "Pro bono, it is just the right thing to do."

Gregory T. Holtz
20th Circuit
Estero

The career of attorney Gregory T. Holtz has taken many directions.

After earning his law degree in 1977 from Case Western Reserve University, he was a legal counsel for the United Savings Association in Cleveland, then was a prosecutor and solicitor for Brooklyn Heights, Ohio, and also ran his own firm for five years. He was admitted to The Florida Bar in 1980. But in 1984, he went into the banking industry, first as a vice president of Society National Bank in Cleveland and then as senior vice president and managing director of U.S. Bank in Naples until 2013.

After all those years in the banking industry, Holtz, who now lives in Estero, had a strong desire to use his legal knowledge and skills to help people who were less fortunate. So he approached Legal Aid Service of Collier County, offering his services as a pro bono attorney.

Since mid-2013, that's what Holtz has done, handling more than 30 pro bono cases and providing more than 190 hours of pro bono service for Legal Aid Service of Collier County and the Collier Lawyers Care Pro Bono Program. That doesn't include hours on cases that have not yet closed.

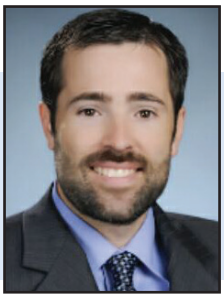
Most of Holtz's pro bono work has involved critical areas such as consumer law, landlord/tenant issues and more complex probate issues. In conjunction with Legal Aid Service of Collier County, he has provided legal services to owners of homes built by Habitat for Humanity in the greater Naples area.

Holtz is a professor at Ave Maria School of Law in Naples. There, in addition to being an instructor in wills, trusts and estates, he supervises externship and a pro bono program, allowing law students to assist in the delivery of legal services to the underserved.

Through his commitment, energy and focus, Holtz has made a difference in the lives of the clients—many of them insecure economically—whom he has represented and advised.

His willingness to serve others during the second stage of his career inspires everyone at Legal Aid Service of Collier County and in his local legal community.

Elder law section members Andrew R. Boyer, Michelle L. Farkas and Gregory T. Holtz celebrate after being presented their Pro Bono Service Awards.
photo by Twyla Sketchley



Pro bono services ... Needed now more than ever

by Andrew R. Boyer

Though the economy seems to be getting back on its feet, our work is not finished as it relates to providing access to the court system for those who cannot afford it. As elder law attorneys, we are in a unique position to better the lives of our clients and their families. When our services are provided on a pro bono basis due to our clients' limited means, the impact we can have on the client is only magnified and our satisfaction for a job well done taken to a new level.

It has been my experience that the attorneys drawn to this area of practice understand how important providing pro bono service is, not just for the individual client but for our legal system as a whole. It was no surprise to me that I was not the only Elder Law Section member to receive the 2015 Florida Bar President's Pro Bono Service Award at the Florida Supreme Court in January. It was an honor to be joined there by section members Michelle Farkas and Gregory Holtz.

Elder law has received a lot of attention lately in the media and from our lawmakers. Unfortunately, and many times without basis, lawyers become easy targets for blame. Our continued willingness to get involved in pro bono work and to provide other leadership in our communities is a reminder to the public that the work we do is not a commodity but a societal necessity; and as practitioners, we should be sought after for the solutions rather than perceived to be the source of any problem.

I encourage every section member to contact their local pro bono coordinator or legal aid program and ask how they can get involved.

***Andrew R. Boyer, Esq.**, of Boyer & Boyer PA in Sarasota, practices in the areas of probate, guardianship, estate planning, estate tax planning and public benefits planning and is licensed to practice law in the state of Florida as well as before the United States District Court for the Middle District of Florida.*

SECTION NEWS

Mark your calendar!

The Florida Bar Annual Convention
June 24-27, 2015, 2015
Boca Raton Resort & Club

ELS Executive Council Award Luncheon
June 26, 2015 • Noon - 2 p.m.
Boca Raton Resort & Club

ELS Executive Council Meeting
June 26, 2015 • 2-4 p.m.
Boca Raton Resort & Club

Social Security Disability Seminar
August 25, 2015
World Center Marriott, Orlando

Elder Law Section Retreat
October 16-18, 2015
Royal Sonesta Hotel
New Orleans

The Florida Bar Winter Meeting
January 21-23, 2016
Hilton Orlando
Lake Buena Vista

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Defining success—How to tell if your marketing plan is working

by Jennifer Campbell Goddard

How do you define success? Luxury cars, a second home and great vacations, right? Now, how do you define marketing success? A busy appointment schedule, a steady stream of new clients, good cash flow, an office with good teamwork. Actually, these are the results of a good marketing plan. Today, measuring the success of your marketing plan happens on a far more sophisticated level than ever before.

For example, do you know:

- How many people come to your website on a monthly, weekly, daily or hourly basis?
- What pages they visit on your website?
- How many respond to workshop invitations?
- How many have scheduled an appointment after the workshop?
- What percent of your appointments become clients?

All of this information is easily available through your website if it contains Google Analytics. Workshop information should be easily available if a CRM (customer relationship management) system is being used to schedule, promote and manage workshops. And knowing how many of your appointments become clients is critical to the life of your practice. All of this information should be easily accessible, automatically generated and reviewed on a regular basis.

Today, we have unprecedented access to data generated by marketing tools that allows us to fine-tune everything in our marketing tool chest. We can ramp up the ones that work, modify or discard those that do not and set real metrics for success by focusing marketing dollars on what works.

A higher degree of marketing savvy sets you apart from your competitors and gives you the edge—which helps you reach success, however you measure it. What follows is a quick look at digital marketing basics, all of which can be tracked, measured and improved for maximum performance.

Making your website appear prominently in searches requires adding relevant content on a frequent basis, which is usually accomplished through a blog. If you don't have the time to research and write blogs, consider a digital agency that includes blog content as part of its services. Same for social media like Facebook, LinkedIn and You Tube.

Speaking of You Tube, videos are the missing link on many law firms' websites. We know from our own data, which encompasses 10 years of law firm analytics, that websites with videos outperform those without them. You Tube generates billions of views every single day. If all of your digital marketing is focused on Google, you have missed half the market.

Properly produced, videos are powerful means of making your website personal, taking a fact-driven service and making it personal. Look at it this way—who do you feel you know better—the television news anchor who shares the news with you every night or the radio personality on your local drive time radio station? Because we see the television anchor, and not the radio personality, we feel like we know television news anchors. Lawyer videos create that same familiarity and comfort level.

Is your website mobile friendly, that is, does it work as well on a smartphone as it does on a desktop? Just because your website appears on the phone does not mean it is mobile friendly. A truly mobile friendly website has a different structure, loads quickly and does not require pinching or swiping to access content. Here's why it matters, more now than ever before: On April 21, Google launched a major change in ranking algorithms. Websites that were not mobile friendly saw an impact in visibility (or, more to the point, how invisible they became). Use this Google Developers test to find out how your website ranks: *https://www.google.com/webmasters/tools/mobile-friendly/*.

All of your marketing efforts can and should be tracked, measured and adjusted to get the most ROI from your investment. If you do not already set aside time every month to review your marketing, consider making it a fixed appointment. Review website analytics to find out if they are performing for you. Are there increases in traffic when a new blog is posted or when a newsletter is sent? Are there days of the week when your phones are busy, and have you shifted staffing to make sure each person who calls speaks with a member of your team?

Don't make the mistake of treating marketing like a "set it and forget it" part of your practice. By tracking, evaluating and making changes to your various tools, your firm can be better positioned for success.

Jennifer Campbell Goddard *is vice president/CEO of Integrity Marketing Solutions. IMS has been serving lawyers and law firms since 1995. The firm began as a marketing consulting practice and quickly grew to a full-service marketing agency offering newsletters, websites and internet marketing, PowerPoint workshops on CD, public relations services, attorney and staff education and practice coaching. Today IMS serves more than 200 law firms in 40 states and the District of Columbia. The firm provides a variety of marketing services to lawyers and law firms, with a specialty in trusts and estates law.*

Five ways to set, manage and make sure you meet your clients' expectations

by Twyla Sketchley, BCS

When clients hire an attorney, there are several things they are likely thinking:

1) Wow, she is expensive!
2) How long is this going to take?
3) Who is she going to tell about my case?
4) Do I really have to go to court?
5) She dresses nothing like the attorneys on The *Good Wife*.

Most clients have not dealt with attorneys in their personal or business interactions. Their impressions of attorneys, the work we do and the way we should act often come from television and movies, which rarely portray reality. In short, clients usually have no idea what to expect when they retain an attorney to help with a guardianship, health care cost planning or estate planning documents.

Clients with unrealistic expectations are often disappointed. A disappointed client can become a difficult, unhappy client, which makes an attorney and the firm miserable and the possible target of that client's informal and formal complaints. Part of the attorney's job is to help the client understand the reality of being represented by an attorney, to set appropriate expectations and to manage those expectations throughout the relationship.

As the old adage goes, "We teach people how to treat us." Attorneys should take the opportunity to teach clients what to expect when they are represented. Here are five things every attorney can do to teach clients what to expect and to show them that their expectations are being met in nearly every matter:

1. Written representation agreements. Every client should have a written representation agreement that sets out the scope of representation, fees and costs and the basic expectations of the attorney/client relationship. The representation agreement sets the basic framework for the attorney/client relationship.

2. New client expectations packet. Develop a new client orientation packet that the firm provides to all clients. This packet should describe the basics of the type of case(s) the attorney is handling for the client, common processes associated with those cases, the client's responsibilities, ways the client can reduce his costs, how and when to make appointments with the office by telephone and in person and the deadlines for various processes and office procedures such discovery or billing.

3. Status updates. Clients want to know how their cases are being managed and what progress is being made, even when the attorney knows there is very little happening. To assure a client that the case is moving forward and that the attorney is spending time on the matter, send a regular written update. During certain processes, it is the only way a client can see that an attorney is working. It also provides the client with a tangible product.

4. Regular billing. Attorneys should send regular billing statements, even in flat fee cases. A regular billing statement should itemize the time and tasks that the attorney and staff have spent on the case in a way that the client can easily read and understand. In addition to making it easier to collect fees, a regular billing statement also shows the client how much work is done on his behalf, even when he is unable to see the work being done.

5. Client satisfaction survey. Finally, to be sure that expectations have been met or to see where they have not, attorneys should send out a client satisfaction survey at the close of each representation asking clients to rate how they believe the attorney and the firm met expectations. The survey can be anonymous and should seek to elicit information that can be used to improve service to clients or better manage clients' expectations in future cases.

***Twyla Sketchley, BCS**, is a Florida Bar board certified elder law attorney with The Sketchley Law Firm PA in Tallahassee. She is chair of The Florida Bar Law Office Management Assistance Service (LOMAS) Advisory Board and past chair of the Elder Law Section. She has run her own elder law firm since 2002 and provides law practice management consulting and coaching to solo and small firms.*

Committees keep you current on practice issues

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

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SECTION NEWS

Elder Law Annual Update: January 16-17, 2015 Orlando

Stuart Otto of Krause Financial (ELS sponsor) explains to attorney Scott Selis one of Krause's many planning tools.

Twyla Sketchley speaks on the topic of elder abuse during the first day of the conference (Fundamentals).

Frank S. Leontitsis and Ryan Rupert of Heirlink, a new vendor to this event, explain how they locate missing heirs to ELS past chair Lauchlin T. Waldoch.

Jana McConnaughhay (chair), Arlee Colman (section administrator) and Jason Waddell (steering committee for the Annual Update and Certification Review)

David A. Hook (chair-elect and program chair), Collett P. Small (secretary), Evett Simons (guest speaker) and Sam W. Boone, Jr. (CLE committee chair)

Alex Hanley of Jurisco Co. (an ELS platinum sponsor) with ELS past chair Twyla Sketchley

Executive council members discuss pending matters during the executive council meeting, to which general members were invited to observe news and updates.

Emma Hemness discusses planning and strategies as they relate to Medicaid.

Photos provided by Twyla Sketchley

SECTION NEWS

3rd Annual Central Florida Diversity Mentoring Picnic!

The Third Annual Central Florida Diversity Mentoring Picnic was held on January 31 at the Florida A&M University College of Law in Orlando. The day began with a CLE and panel discussion on cultural competency and racial, gender and sexual preference bias. The panel included Ava Doppelt, an intellectual property attorney from Orlando; Penelope Perez-Kelly, a civil litigator from Orlando; Natalie Jackson, a civil rights attorney from Orlando (she represented the family of Trayvon Martin last year); and Brittany Maxey, a scientist and patent attorney from St. Petersburg.

The event included a picnic lunch on the FAMU campus, with music provided by the reggae band Rising Lion.

Local attorneys participated in "speed mentoring" of area law students. Administrative Law Judge Janet Mahon of the Social Security Administration (above, at left) was one of the mentors.

Pictured here are attorney Charles Hawkins of Orlando, an event presenter; Susan Fox, chairperson of the event; Nick Shannin, president, Orange County Bar Association; and estate lawyer Beth Waddell.

The annual event was attended by approximately 200 attorneys and law students and had the support of many sponsors, including the Elder Law Section of The Florida Bar.

COMMITTEE REPORTS

Exploitation & Abuse Committee

Angela Warren and Amy Mason Collins, co-chairs

The Exploitation & Abuse Committee cosponsored a workshop with the Office of the Attorney General's Florida Crime Prevention Training Institute again this year. This is the fourth year that we have participated in the joint workshop. The workshop entitled "The Complexity of Elder Exploitation: Addressing the Challenge" was held May 4-6, 2015, at the Embassy Suites Hotel in Altamonte Springs.

The workshop is intended to bring together elder law attorneys who see clients who have been exploited, law enforcement investigators who are on the front lines of the investigations and prosecutors who must carry the cases forward under the law.

Speakers included Shannon Miller, Esq.; Richard Sherman, Esq.; Laura Moody, Esq.; Lisa Chittaro, Esq.; investigator Stephen Menge; Dr. David Smuckler; Dr. Lori Daiello; Catherine "Anne" Avery, R.N., L.N.C., with AHCA; and Susan Keeton, CPA. They spoke on a wide range of topics including: where we currently stand on elder exploitation; joining forces with state attorney's offices, elder service providers, law enforcement and elder law attorneys; memory disorders; the correlation between medications and memory loss; bridging the gap between the banking industry and law enforcement; investigations from a medical perspective; and solving the puzzle of financial exploitation.

Committee meetings are held on the first Thursday of every month at 11 a.m. Central/12 noon Eastern. If you are interested in joining the Exploitation & Abuse Committee, please email Amy Mason Collins at *amy@mclawgroup.com* Angela N. Warren at *awarren@popebarloga.com.*

Guardianship Committee

Carolyn Landon and Victoria Heuler, co-chairs

The Guardianship Committee has been meeting by telephone at 12 noon on the second and fourth Wednesdays of every month. Due to the plethora of guardianship bills filed in the Florida Legislature, we have changed our meeting schedule to every Wednesday at noon.

We began this legislative session concerned mainly with House Bill 5 filed by Representative Kathleen Passidomo (R-Naples). Senator Kelli Stargel (R-Lakeland) filed Senate Bill 366, a bill similar to HB 5. We now have Senate Bill 1226, filed by Senator Nancy Detert (R-Venice).

On the bright side, we held the Guardianship Intensive Program on Mar. 27, 2015, in Tampa.

If you are interested in joining the Guardianship Committee, please email Victoria Heuler at *victoria@hwelderlaw.com or* Carolyn Landon at *carolyn@landonlaw.net.*

Medicaid & Government Benefits Committee

Amanda M. Wolf and Heather C. Kirson, co-chairs

The Medicaid Committee meets telephonically on the first Tuesday of each month at 8:30 a.m.

We have the following subcommittees:

- A rule making/legislative subcommittee to review and analyze changes proposed by the Department of Children and Families (DCF)
- A subcommittee in charge of writing or securing articles for the Advocate
- A subcommittee to secure speakers on different topics for our monthly meetings

A letter was forwarded to DCF, on behalf of the section and AFELA, regarding concern about the draft language of Proposed Rule 65A-1.7141 and how it might negatively affect community spouses.

The rule making/legislative subcommittee is reviewing and analyzing HB 309/SB 768 regarding patient admission/observation status notification.

Brooks Gentry, Esq., will be speaking to the committee on the issue of Medicaid and same sex marriage in Florida.

Membership Committee

Robert Morgan and Donna McMillan, co-chairs

The Membership Committee is working on adding an online directory to our section's webpage. The Elder Law Section's membership page on The Florida Bar's website is now current and refreshed nightly. The public can now search the site for board certified elder law attorneys and get a current and correct list of board certified attorneys. Our next step is linking The Florida Bar Elder Law Section's member directory to our section's webpage.

We are working on an email to send to non-section members who attend our seminars inviting them to join our section and informing them of the benefits of membership in the Elder Law Section.

We are in contact with the Young Lawyers Division to set up one or more informational sessions regarding our section and its benefits of membership.

Special Needs Trust Committee

Travis D. Finchum, chair

Members of the Special Needs Trust Committee have been active in

reviewing and suggesting changes to the proposed legislation for Florida's implementation of the Achieving a Better Life Experience Act of 2014 (ABLE Act). The ABLE Act was passed by Congress late last year and signed by the president in December. The purpose of the Act is to:

1. encourage and assist individuals and families in saving private funds for the purpose of supporting individuals with disabilities to maintain health, independence and quality of life; and
2. provide secure funding for disability-related expenses of beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, title XVI (Supplemental Security Income) and title XIX (Medicaid) of the Social Security Act, the beneficiary's employment and other sources.

The federal law requires each state to implement this program. Although there are no federal regulations yet, many states, including Florida, are passing laws to set the groundwork for the program.

Senate Bill 642 enacting the Florida ABLE program has been submitted to the governor. Florida will fold ABLE under the Florida Prepaid College Board. There will be a direct support organization formed, Florida ABLE Inc., that will oversee the ABLE program. We know that ABLE will be a savings program in which individuals and their families or friends can contribute annual exclusion gifts into an account where the funds will grow tax free provided they are used for certain qualifying expenses. The accounts are compared to 529 educational savings plans, but expenses are not limited to education. We still await federal regulations that need to be adopted by the IRS, so implementation in Florida will likely take the next year to accomplish.

We are planning to have an educational committee meeting in conjunction with the AFELA Mid Year UnProgram on June 12, 2015, where we will discuss hot topics and practical tips related to special needs trusts.

Unlicensed Practice of Law Committee

John R. Frazier, chair

On Jan. 15, 2015, the Florida Supreme Court issued the advisory opinion that addresses the Medicaid planning activities of non-attorneys. On Jan. 30, 2015, stockbroker William D. Burns, through his attorney Stephen M. Masterson, filed a motion for rehearing with the Florida Supreme Court. Mr. Burns filed on the last filing day possible, and the advisory opinion will not become final until the Florida Supreme Court addresses the motion for rehearing.

The UPL Committee would like thank all of the individuals who have contributed to the UPL advisory opinion process. Those individuals include all the past and present members of the UPL Committee, all of the chairs of the Elder Law Section who have been involved in this process, all those who provided oral testimony at the Feb. 22, 2013, Florida Bar hearing in Tampa, all those who personally attended the Tampa hearing but did not testify, all those who provided written testimony prior to the hearing in Tampa, Al Rothstein (a non-attorney member of the UPL Committee) for arranging media coverage for the Tampa hearing and attorney Robert Sondak who is representing the Elder Law Section, pro bono, before the Florida Supreme Court, regarding the advisory opinion process.

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

The Unlicensed Practice of Law Committee holds a monthly teleconference on the third Tuesday of every month at 4 p.m.

Homestead issues in Medicaid planning

Tips & Tales

by Kara Evans

The tale: A friend calls you up to talk about her parents. Her father has been in the nursing home for some time, and now her mother is on hospice care. Your friend is concerned about what to do with her parents' home after her mother's death. Her father cannot spare any money to pay the expenses, and the insurance company will not continue a policy on an unoccupied house. She wants to know what her options are and if she should act immediately or wait until her mother passes. Do you know what to tell her?

The tip: It is always a conundrum of sorts: what to do with the homestead property when engaging in Medicaid planning. After all, the homestead is a non-countable asset. Furthermore, even if your client dies owning a homestead, it is likely not subject to creditors' claims or estate recovery. So, what is the big deal? Why not leave the clients' homestead in their names and have it pass to their heirs at death?

Well for one thing, not every client is survived by a "qualified heir" to whom the constitutional exemption from the claims of the decedent's creditors inures. Married couples will have different issues than single persons. Not every planning situation is the same.

When dealing with married couples, it is important to be aware of and to plan for the event that the community spouse might die first. If the home is owned as husband and wife or as joint tenant with rights of survivorship, then the institutionalized spouse will be left with a vacant property and no funds with which to pay the upkeep. One available strategy is to transfer the home to the community spouse. The community spouse must then address the homestead in his or her estate plan. Many practitioners use a testamentary special needs trust for the benefit of the institutionalized spouse. The special needs trust's trustee can then sell the home or use funds from the special needs trust to pay expenses. The key to this strategy is to recognize that if at the community spouse's death the home is to be devised to anyone other than the institutional spouse, then the institutionalized spouse will need to waive his or her homestead rights. I advise the community spouse to have the institutionalized spouse sign a post-nuptial agreement waiving homestead and elective share rights. Then I add language to the deed stating: "This property is the homestead of the grantor/grantee and has been joined by the grantor's spouse who has waived his (her) homestead rights in a separate document."

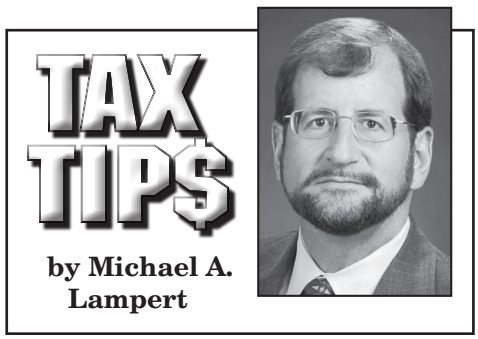
When dealing with an unmarried individual, the homestead matter becomes more urgent and more complicated, as there are fewer options. An individual receiving Medicaid assistance, especially one in a nursing home or an assisted living facility, will not have the extra funds for property insurance, taxes and other expenses associated with homeownership. For these people, there is always the option to rent the home. This solves the problem of not having funds to pay expenses because the expenses associated with the property can be deducted from the income stream generated by the property before the amount of income to a Medicaid recipient is determined. Converting a homestead to a rental, however, will result in the loss of all homestead protections including the constitutional exemption from forced sale that inures to the heirs of the owner (Article X Section 4). Always remember to use an enhanced life estate deed to allow the property to be transferred to the client's heirs upon death.

The Department of Children and Families Program Policy Manual has other allowable options for homestead transfers that should not be overlooked. An individual may transfer his or her home to the spouse, a child under 21 years of age, a blind or disabled adult child, a sibling who has an equity interest in the home and lived in the home for one year immediately before the individual became institutionalized or an adult child who resided in the home for two years immediately before the individual became institutionalized and provided care for the individual that delayed the institutionalization.

There are many factors that should go into considering what to do with the homestead. "Leave it as is" is almost always the wrong answer.

Kara Evans *is a sole practitioner with offices located 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.*

Tax tips for elder lawyers



by Michael A. Lampert

Income tax returns of sick or disabled person

It is not uncommon for an elder lawyer to have sick or disabled clients. Yet these clients often need to file income tax returns. Who can sign a tax return if the client cannot?

For a joint income tax return, the filing (well) spouse can sign for the disabled spouse by simply signing the disabled spouse's name and adding "By Husband (or Wife)" and attaching to the return a statement explaining why the disabled spouse did not sign. For individual returns, the return must be filed and signed by a duly authorized agent, such as a guardian or an attorney-in-fact under a durable power of attorney.

Trap #1

The practitioner representing an incapacitated client should never alone rely on a Form 2848, Power of Attorney and Declaration of Representative, signed while the taxpayer client had capacity. Such a power of attorney, because it is not durable, is revoked upon the taxpayer's incapacity. *Halper v. Commissioner*, 73 T.C.M. (CCH) 1897 (1997).

Trap #2

The statute of limitations on the assessment of additional tax does not begin to run on a return filed without a signature or on a return signed by another who is without authority. *Richardson v. Commissioner*, 72 T.C. 818 (1979) (unsigned return); *Elliott v. Commissioner*, 113 T.C. 125 (1999) (signature of person without authority).

What about filing for an income tax refund? As a reminder, refund claims must normally be filed within three years following the filing of the return or two years after payment of the tax, if later. I.R.C. § 6511.

Tip #1

When assuming representation for an incapacitated person, the practitioner should check to see if all tax returns have been timely filed. The practitioner should also determine whether the taxpayer client might be entitled to any refunds.

But what if the taxpayer client is incapacitated? If the refund deadline is missed, the practitioner should determine whether the limitations period has been tolled on account of the taxpayer's disability. The limitations period on refund claims is suspended during any period in which the taxpayer is unable to manage the taxpayer's financial affairs by reason of a medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for at least one year. No suspension of the statute of limitations occurs, however, if the taxpayer's spouse or other person, such as a guardian or an agent under a durable power of attorney, is authorized to act on the taxpayer's behalf with respect to financial matters. I.R.C § 6511(h)(2)(b).

Tip #2

When requesting a suspension of the limitations period on account of disability, a statement of a physician certifying that the taxpayer had the requisite disability must be submitted. In addition, the person filing the claim for refund or credit must certify that, during the period of disability, no one was authorized to act on the taxpayer's behalf. Rev. Proc. 99-21. Obtaining tax counsel assistance is advisable.

Filing income tax returns upon death of spouse

Who files the income tax return when one spouse dies? The surviving spouse may file a joint return with the decedent for the year of death unless the survivor has remarried before the close of that year. I.R.C. § 6013(a)(2). If a personal representative or other administrator has been appointed before the last day prescribed by law for filing the return, the decedent's personal representative (referred to as executor in much of the I.R.S. guidance) or the administrator must join in the deceased client's income tax return. I.R.C. § 6013(a)(3). The personal representative or the administrator does not have to agree to filing a joint income tax return. If there is no personal representative appointed, the surviving spouse may file a joint return on the couple's behalf, unless the deceased spouse had already filed a separate return for the taxable year. I.R.C § 6013(a)(3). If a separate return had already been filed by the decedent, the surviving spouse may file a joint return only if a personal representative or an administrator is appointed who elects to join in the filing. I.R.C. § 6013(b)(1).

Trap #1

When an executor (personal representative) or an administrator is appointed for a deceased spouse after the surviving spouse has filed a joint return, the executor or the administrator may disaffirm the joint return for one year after the due date for the filing of the surviving spouse's return. I.R.C. § 6013(a)(3). This election is exercised by the filing of a separate return for the decedent. The IRS will then treat the survivor's return as a separate return and calculate the tax accordingly. Be especially careful with this risk when there is actual or threatened fiduciary litigation or disputes between the surviving spouse and children.

In addition to the right to file a joint return for the taxable year of

continued, next page

the deceased spouse's death, the surviving spouse may also be eligible to file as a qualifying widow(er) and continue to be taxed at joint income tax return rates for up to two taxable years following the taxable year of the decedent's death. I.R.C. §§ 1(a), 2(a)(1)(A). To qualify for this benefit, the surviving spouse must:

1. maintain as the surviving spouse's home a household (I.R.C. § 2(a)(1)(B)), which, for the taxable year, is the principal abode of a dependent son, daughter or stepchild. These terms include adopted and foster children (I.R.C. § 152(b)(2)) for which the survivor is entitled to take a deduction for a personal exemption for that year;
2. not have remarried before the close of the taxable year (I.R.C. § 2(a)(2)(A)); and
3. have been entitled to file a joint return for the taxable year in which the decedent spouse died, without regard to the executor's or the administrator's authority to elect a separate return (I.R.C. § 2(a)(2)(B))

Trap #2

The filing of an income tax return for a decedent is separate from any requirement to file an income tax return for the decedent's estate/trust.

Without proper substantiation, no charitable deduction of household goods

It is not uncommon for a family member to donate some of the decedent's tangible personal property to charity. As is demonstrated in a recent case, proper record keeping is essential. In this case, after his mother's death, the taxpayer deducted nearly $28,000 in charitable contributions for donations of his parents' household goods, clothing and electronic equipment to a qualified charity. The taxpayer combined all of the donation acknowledgments on two blank "tax receipts" provided by the charity and prepared a spreadsheet identifying the items donated and valuing them using lists found on the Salvation Army's website. The tax court held that none of the charitable contribution deductions were allowed because the taxpayer failed to satisfy the substantiation requirements of IRC Sec. 170(f)(8) and (11). He didn't provide evidence to show the goods' condition or obtain an appraisal to support their value. Thad Deshawen Smith, TC Memo 2014-203 (Tax Ct.).

Tip #1

When handling an estate where tangible personal property is donated, make sure that there is proper donation documentation. When the donation is large enough, an appraisal may be needed. In addition, be careful that the intended donor is listed as the charitable donor.

Don't forget other states' tax issues

There are many non-Florida tax issues that need to be considered in both estate planning and in handling decedents' estates. Some include:

Old state taxes: States such as New York continue aggressively to attempt to collect back income and other taxes from their former state residents/now current Florida residents. New York, as an example, has been hiring Florida attorneys to domesticate and collect on New York tax warrants.

State death taxes: Some states' death taxes begin well below the current federal estate tax exemption amount and have an even lower exemption amount for in-state property of non residents.

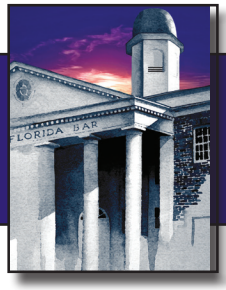
Change in residency: Remember that bringing a family member client "up north" to "be with the kids" or to be in a care facility closer to the children or other family members can inadvertently change the family member's state of residence. This may result in death taxes (estate and where applicable, inheritance taxes) and state income taxes. Careful planning can reduce the risk of the family member being deemed to be a non-Florida resident.

State taxation of Social Security benefits: Under federal tax law, some portion of Social Security benefits may be included in a taxpayer's adjusted gross income (AGI). Most states with a state individual income tax base the tax on the federally determined AGI. Some states, however, subtract Social Security from AGI, and some states do not base the tax on federal AGI, yet may exclude Social Security benefits.

Trap #1

Be careful if there is a federal income tax adjustment for a tax year when your client was a resident of another state. Not only might there be increased federal income tax, but the former state may increase the state income tax based on the federal change. This arises, for example, in an IRS audit or when the IRS asserts a tax change based on information that it received from a third party, such as a financial institution reporting the client's income to the IRS.

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



Summary of selected case law

by Diane Zuckerman

Authority to amend ward's living revocable trust in a guardianship proceeding

Lisa Rene, Appellant, v. Janie Sykes-Kennedy and Lillie S. White, etc., Appellees, Case No. 5D14-975 (5th DCA, Jan. 2015)

The appellant in this case unsuccessfully challenged the trial court's authority to amend the ward's revocable living trust to name another trustee. The grantor/ward Lillie S. White (hereinafter referred to as White) had created a revocable living trust in 2006, in which she had appointed her granddaughter Lisa Rene as her successor trustee. Years later, in 2013, the trial court determined that White was incapacitated and appointed White's sister Janie Sykes-Kennedy (the appellee herein) to be White's legal limited guardian. The court determined, among other things, that White lacked capacity to manage property and to make gifts.

After appointment, Sykes-Kennedy petitioned the court to amend the ward's living revocable trust to replace Lisa Rene as successor trustee. In support of the petition, she argued that access to the assets in the trust was needed to properly care for the ward.

After an evidentiary hearing, the trial court determined that the ward's best interest would be served by having the guardian serve as the trustee, and the court authorized the guardian to amend the trust for this purpose only. The order apparently prohibited the trustee from making any other amendments to the trust instrument.

The appellant argued unsuccessfully that the court lacked jurisdiction to amend White's revocable trust, citing § 736.0201, Florida Statutes, for the proposition that all proceedings regarding trusts shall be commenced by the filing of a complaint governed by the Florida Rules of Civil Procedure.

In rejecting the appellant's argument, the Fifth District cited to §§ 744.441 and 736.0602(6), Florida Statutes, which provide authority for guardians to amend a ward's trust, with the court's approval.

In affirming the trial court's decision, the district court reasoned that White, had she not been incapacitated, had the power to appoint a successor trustee and further that such an amendment was in the ward's best interest. Given that there was substantial competent evidence to support the trial court's ruling, its decision was affirmed.

As a practice tip, this case will be useful to guardianship attorneys and guardians whose wards may have assets in a revocable living trust and have difficulty accessing those funds.

Attorney's fees/proper pleading/objection and waiver

Lowell Amey Van Vechten, as Personal Representative and Trustee of the Estate of Nicola H. Amey, Appellant, v. Erica Anyzeski, as Personal Representative of the Estate of Milton Lain Benjamin, Appellee, Case No.'s 4D13-2980 and 4D13-3520 (4th DCA, Jan. 2015)

The decedent had executed a trust that originally provided that, upon the death of the decedent, the trustee was to distribute both a life estate and a sum of $100,000 to a beneficiary. Later, the decedent amended the trust, changing the terms wherein the beneficiary's gift was reduced to $25,000 only.

Upon death, the trustee served notice of the existence of the trust as amended to the interested persons, including the beneficiary. The beneficiary then, without filing any petition to contest the validity of the trust amendment, served discovery upon the trustee.

Following this, the trustee filed a motion for attorney's fees against the beneficiary, alleging that the beneficiary's refusal to accept the $25,000 bequest and the service of discovery constituted an action that challenged the powers of the trustee.

The trustee requested that any award of attorney's fees be deducted from the beneficiary's specific bequest of $25,000.

Eventually the beneficiary petitioned the court to revoke the amendment to the trust, and later amended it, so at the time of trial, the pleading at issue was the second amended petition to revoke the trust amendment. Prior to the non-jury trial, the parties entered into a pretrial stipulation, which listed entitlement to the recovery of attorney's fees pursuant to §§ 736.1005, 736.1006 and 736.1006, Florida Statutes. The court summarized the relevant provisions of those statutes as follows:

Section 736.1005(1) - Any attorney who has rendered services to a trust may be awarded reasonable compensation from the trust.

Section 1005(2) - Whenever attorney's fees are to paid out of the trust, the court, in its discretion, may direct from what part of the trust the fess shall be paid.

Section 736.1006(1) - In all trust proceedings, costs may be awarded as in chancery actions.

Section 736.1006(2) - Whenever costs are to be paid out of the trust, the court, in its discretion, may direct from what part of the trust the costs shall be paid.

Section 736.1007(5) - In addition to the attorney's fees for ordinary services, that attorney for the trustee

continued, next page

shall be allowed further reasonable compensation for any extraordinary service. Extraordinary services may include, but are not limited to … involvement in a trust contest … .

The court held a non-jury trial, and the beneficiary did not prevail on her petition to revoke the trust amendment. At the conclusion, the court denied the attorney's fees because the trustee's attorney had not pled the attorney's fees in the answer to the beneficiary's second amended petition to revoke the trust amendment, despite it having been raised in the pretrial stipulation. In other words, the trial judge concluded that the trustee had waived entitlement to attorney's fees because they had not been pled at the time of trial, based on the beneficiary's objection.

After post-trial motions for rehearing and responses, the trial court again denied the motion for attorney's fees and ordered the trustee to pay the beneficiary the $25,000 less trustee's costs only, and the appeal ensued.

On appeal, the trustee argued that the trial court had erred in finding that the beneficiary had not waived her objection to the alleged inadequate pleading of entitlement to attorney's fees. The Fourth District agreed and found that the beneficiary (later the beneficiary's estate) had waived its objection to the trustee's alleged inadequate pleading of an entitlement to attorney's fees. The Fourth District cited *Stockman v. Down,* 573 So. 2d. 835 (Fla.1991), for the proposition that attorney's fees must be pled and failure to plead constitutes waiver of attorney's fees, absent an exception. In *Stockman*, the Florida Supreme Court articulated that exception, holding that "where a party has notice that an opponent claims entitlement to attorney's fees, and by its conduct recognizes or acquiesces to that claim or otherwise fails to object to the failure to plead entitlement, that party waives any objection to the failure to claim for attorney's fees."

The Fourth District ruled that by virtue of the joint stipulation language, the beneficiary's estate had notice of the attorney's fees claim and therefore had waived the objection to the alleged failure to plead entitlement to attorney's fees. The Fourth District reversed and remanded the case to the trial court to consider the claim to attorney's fees.

The take-home message is clear; when litigating an action in which attorney's fees are likely to be requested, they must be sufficiently pled in the complaint or the answer prior to trial. Failure to do so will result in the waiver of attorney's fees unless the facts successfully fit into the notice exception to the general rule, as happened here.

Summary judgment, will signing procedure

Arlyne Beth Helfenbein, Appellant, v. Estelle Baval, Appellee, Case No. 4D13-2366, (4th DCA, Feb. 2015)

In this case, a wife prevailed on her motion for summary judgment for elective share. The issue turned on the validity of a second will. The decedent's daughter, as the nominated personal representative of the estate, submitted two wills signed by the testator, one from 1982 and a second one from 2007. The 1982 will contained a waiver of elective share rights, but the 2007 will did not. Before either will was admitted to probate, the wife filed a petition to take her elective share and filed a motion for summary judgment regarding her entitlement under the 2007 will. Both the trial and appellate courts agreed that the elective share waiver that attached to the 1982 will would not apply to the 2007 will.

In response to the wife's motion for summary judgment on entitlement to elective share, the daughter claimed the 2007 will was not valid. In support of her assertion, she attached an affidavit of a purported witness to the 2007 will named Murray Adler. In that affidavit, Adler said he did not sign the will in the presence of the other witnesses and did not witness the testator sign the 2007 will.

The inference was that the will lacked validity because it did not comply with the requirements of § 732.503(1), Florida Statutes (2007), which provided in relevant part:

> A will or codicil executed in conformity with s. 732.502 may be made self-proved at the time of its execution or at any subsequent date by the acknowledgment of it by the testator and affidavits of the witnesses, made before an officer authorized to administer oaths and evidenced by the officer's certificate attached to or following the will … .

The appellate court noted that the above statute contemplates that the will is already in conformance with § 732.502, Florida Statutes. Adler's affidavit stating that the will was not signed in the presence of other witnesses inferred non-compliance. This created a genuine issue of material, and therefore summary judgment was improper.

The Fourth District also commented on other irregularities in the self-proof part of the will. Accordingly, the court reversed the entry of summary judgment and remanded for further proceedings as to the validity of the will.

This case reminds us of how a summary judgment can be a hollow victory since summary judgments are often overturned when challenged and can increase the expense of the litigation. The practice tip for us to avoid such a problem is to strictly follow the procedural rules of §§ 732.502 and 732.503, Florida Statutes, in the execution of wills.

Parol evidence, latent ambiguities, guardianship

Jeffrey Whiting, as Trustee of the Lorraine Y. Whiting Trust and Individually, Appellant, v. Anthony Whiting, Individually and as Personal Representative of the Estate of Nicholas Whiting, Appellee, Case No. 5D13-3296 (5th DCA, Feb. 2015)

Lorraine Whiting (hereinafter referred to as Mrs. Whiting) had three

sons: Jeffrey, Anthony and Nicholas Whiting. Her trust, created in 1991, had provided gifts to these sons equally. Two of the sons, Jeffrey and Anthony, had filed competing petitions for incapacity and guardianship in 2008. Thereafter, an extended incapacity proceeding, lasting until 2010, yielded inconsistent expert evidence as to whether Mrs. Whiting was legally incapacitated.

Without a final determination of Mrs. Whiting's incapacity, the parties, including the attorney for Mrs. Whiting, entered into a stipulation for limited guardianship, and the judge signed a corresponding order (hereinafter referred to as the guardianship order). The guardianship order imposed restrictions on Mrs. Whiting's ability to manage her financial affairs (could not transact or gift over $1,500). A proposed professional guardian raised a concern over whether the guardianship was voluntary or involuntary. She noted that a voluntary guardianship required a physician's statement that verified competency. There was no such report concerning Mrs. Whiting. Consequently, the professional guardian refused to serve.

Despite the guardianship order, Mrs. Whiting thereafter amended her trust again (the second amendment) to exclude sons Anthony and Nicholas. Anthony discovered the fact of the amendment after Mrs. Whiting's death in 2011. In 2013, disinherited son Anthony filed a complaint to set aside the second amendment. He filed a motion for summary judgment and argued that the guardianship order prohibited Mrs. Whiting from making an amendment to her trust. Jeffrey opposed the summary judgment, arguing that the guardianship order placed no specific prohibition against trust amendment on Mrs. Whiting and therefore the second amended trust should not be set aside. The judge in the trial court concluded that the guardianship order was unambiguous, refused to hear parol evidence on the issue and thus granted summary judgment.

On appeal, Jeffrey asserted that the trial court erred by failing to consider parol evidence in construing the provisions of the guardianship order. In its ruling, the Fifth District reviewed the law concerning latent ambiguities in written agreements and cited *GE Fanuc Intelligent Platforms Embedded v. Brijot Imaging Sys. Inc.,* 51 So 3d 1243 (1st DCA 2011), that "latent ambiguities exist when the language of an agreement is facially clear but an extrinsic fact creates a need for interpretation." The court noted that parol evidence may be used to clarify such latent ambiguities. The appellate court concluded that there were latent ambiguities in the guardianship order that presented material issues of genuine fact, which precluded summary judgment. The appellate court also noted that there was never a determination of incapacity as to Mrs. Whiting, nor was it clear whether the guardianship was voluntary or involuntary. On remand, the trial court was instructed to hear parol evidence to interpret the guardianship order.

This case will assist those seeking to have parol evidence admitted in a trial when an agreement is at issue and has potential ambiguities. Also, a guardianship practitioner should take care to meet the requirements of a voluntary guardianship, if one is sought.

Diane Zuckerman *graduated from the University of South Florida with the B.S. in nursing and from the Levin College of Law, University of Florida. The first two decades of her career were spent handling medical malpractice and nursing home litigation. She started her own firm in 2008, and she practices in the areas of probate litigation and administration, estate planning, guardianship and Medicaid planning.*

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Fair Hearings Reported

by Diana Coen Zolner

***Petitioner v. Florida Department of Children and Families*, Appeal No. 09F-04274 (October 2, 2009)**

The petitioner appealed the respondent's action in determining the amount of patient responsibility and the community spouse diversion amount in the Institutional Care Program and the Medicaid Program for an application filed on July 6, 2009.

The petitioner resides in a nursing facility and has a spouse that lives in the community in an assisted living facility (ALF). The petitioner has a total gross monthly income of $2,357.89. The community spouse's gross monthly income is $612.83. The couple's combined countable income after all allowable deductions is $2,928. The petitioner was initially over the income limit, and a qualified income trust (QIT) was established. A monthly deposit of $500 was being made to the QIT to allow the petitioner to become eligible for ICP benefits. The petitioner was approved for ICP benefits.

The community spouse was unable to continue living in the community and required custodial care in an ALF. Her monthly expenses at the ALF were $2,811. In addition to the nursing home and ALF expenses, the couple continued to maintain the home that the wife occupied prior to being admitted into the ALF. The home was for sale, but until it sold, the couple continued to pay $155 per month in utilities and $208.33 per month in property taxes.

The respondent determined the community spouse allowance budget for the purpose of diverting funds from the patient responsibility to the community spouse to meet her needs. The allowance takes into consideration the community spouse's shelter cost. The respondent requested information from the ALF as to how much of the community spouse's base fee (room and board) was for her room and how much was for meals. The ALF would not break down the costs as requested, and as a result the total shelter cost for the wife's shelter used by the respondent was zero ($0). The respondent did not recognize the costs of maintaining the unoccupied home of the community spouse.

The petitioner requested an additional diversion to the community spouse to cover the actual expenses of the ALF and the home. As a result of her placement in the ALF, the community spouse's expenses exceed her income. Based on the authority of the Florida Administrative Code at 65A-1.7165(5)(c) ("Spousal Impoverishment Standards") and the dollar amounts for spousal impoverishment set forth in Appendix A-9 of the ACCESS Policy Manual, the respondent determined the community spouse allowance to be $1,209.17 and the patient responsibility to be $1,114.55. The respondent did not give the community spouse a deduction for the cost of maintaining the unoccupied home. The hearing officer did not address the correctness of this action because the cost of maintaining the home did not exceed the required 30 percent of the minimum monthly maintenance income allowance, and therefore there would be no deduction.

In addition to the spousal impoverishment standards, the Florida Administrative Code at 65A-1.72(4)(f) permits possible adjustment to this methodology and the resulting income allowance as follows: "... 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. ... An example is when a community spouse incurs unavoidable expenses for medical, remedial and other support services which impact the community spouse's ability to maintain themself [sic] in the community and in amounts that could not be expected to be paid from amounts already recognized for maintenance and/or amounts held in resources." The hearing officer determined that this rule provides that the minimum monthly maintenance income allowance may be increased if the community spouse has an exceptional circumstance. In this appeal it was determined that the community spouse's health deteriorated to such a point that she could not reside at home and required the assistance provided in an ALF. The hearing officer determined that her health met the requirement of an exceptional circumstance.

Next, the hearing officer needed to determine that the expenses related to the exceptional circumstance created significant financial distress. The hearing officer determined that the costs of the ALF substantially exceeded the community spouse's income, allowing for deviation from the minimum monthly maintenance income allowance. Therefore, the hearing officer determined that the costs of the ALF must be considered in determining what amount, if any, should be diverted to the community spouse. Based on the circumstances of this case, the hearing officer determined that the community spouse diversion should be the remainder of the institutional spouse's income and that the reduced patient responsibility should be zero ($0).

***Petitioner v. Respondent*, Appeal No. 09N-00183 (January 6, 2010)**

At issue in this appeal was whether the facility's intent to discharge the petitioner was correct due to the

facility's inability to meet the petitioner's needs. The petitioner entered the facility on Nov. 1, 2005. In October 2009, the facility issued a discharge notice citing the reason for discharge as "needs cannot be met ... ." The facility reported that over the past year, the behavior of the petitioner had been a concern. The petitioner was repeatedly found in other patients' rooms and was "hitting and yelling at staff." This agitation and combative behavior progressively worsened to the point where the facility determined that the petitioner would require continuous observation, one-on-one care and a locked unit in the near future. Continuous observation was ordered by the facility in an attempt to control the petitioner's adverse behaviors, and facility staff members provided one-on-one coverage of the petitioner throughout the day. As of the date of the hearing, the petitioner remained at the facility, and the facility continued with its intent to discharge. The facility's discharge plan was to relocate the petitioner to a more secure facility that would have a locked unit, and the notice of discharge named such a facility. The petitioner's family preferred an alternate location that would be closer for the petitioner's son to visit and that had a higher quality rating.

Transfer and discharge of residents are addressed at 42 C.F.R. § 483.12, stating in relevant part: "(2) Transfer and discharge requirements. The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless - (i) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility ... or (iii) The safety of the individual in the facility is endangered ... ." The regulations further provide that the resident's clinical record must be documented by a physician when transfer or discharge is necessary. Furthermore, the facility "must 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 ... ." Such notice "must be made by the facility at least 30 days before the resident is transferred or discharged ... and must include (i) the reason for transfer or discharge; (ii) the effective date of transfer or discharge; and (iii) the location to which the resident is transferred or discharged ... ."

Based on all of the evidence and testimony, the hearing officer concluded that the current facility could not adequately meet the individual care needs of the petitioner, as described in the facility's notice. The hearing officer further found that due to the petitioner's wandering and other behavioral concerns, another location that provided greater security was not only preferable but was needed for proper care of the petitioner. In conclusion, the hearing officer stated that while the family might prefer a closer location and other favorable placement, the intended location had a secure section, was appropriately licensed and would be a permissible location for discharge. Therefore, the intent to discharge was justified, and the notice to discharge was upheld.

Petitioner vs. Agency for Health Care Administration (AHCA)

The petitioner appealed the respondent's decision to deny retroactive disenrollment from the Medicaid Waiver Long Term Care Diversion Program (LTCDP) for the month of February 2009 and the respondent's decision to deny payment of the petitioner's February 2009 nursing home charges under the Institutional Care Program (ICP) Medicaid. The petitioner was enrolled in the Medicaid LTCDP from approximately March 2007 through February 2009, and the company contracted by the Department of Elder Affairs to provide the petitioner's LTCDP waiver services was American Eldercare.

In May 2008, the petitioner was transferred from an assisted living facility (ALF) to a rehabilitation facility due to weakness and dehydration. In January 2009, American Eldercare determined that the petitioner no longer needed rehabilitation therapy and should be transferred back to an ALF as soon as possible. The petitioner's son was informed of this decision by American Eldercare, and he, in turn, informed the company that he might want to disenroll his mother from the program and apply for ICP Medicaid coverage to allow her nursing home care to continue. American Eldercare advised the son that since it was already Jan. 28, 2009, disenrollment would be effective Feb. 28, 2009, if he decided to disenroll the petitioner from the program. The son asked for an extension of time to make his decision, and American Eldercare extended its coverage for the petitioner through Feb. 2, 2009. On that date, the petitioner's son advised American Eldercare that he had decided to disenroll his mother from LTCDP and to seek ICP Medicaid so she could remain in the nursing home. A disenrollment form was sent to the petitioner's son, which he completed and returned to American Eldercare on Feb. 4, 2009. American Eldercare submitted the proper forms to DCF on Feb. 6, 2009, which indicated a disenrollment date of Feb. 28, 2009.

The petitioner was subsequently approved for ICP Medicaid effective retroactively to Feb. 1, 2009; however, the respondent denied Medicaid payment of the nursing home charges for February 2009 because the petitioner was still enrolled in the LTCDP in the month of February and Medicaid recipients cannot participate in both programs during the same month. Medicaid paid for the petitioner's nursing home charges beginning March 2009 and moving forward. The petitioner's son requested that American Eldercare reconsider retroactively disenrolling the petitioner from the LTCDP effective Feb. 1, 2009 (instead of Feb. 2, 2009), or pay the petitioner's nursing home charges for February 2009. The respondent denied the request because the petitioner's "needs could have been met in a less restrictive environment such as an assisted living facility ... [and]

continued, next page

the cut off date for disenrollment was January 31, 2009."

As a result of this determination, the petitioner's son requested a hearing and took the position that the petitioner required 24/7 nursing care. He explained that his mother suffered from dementia; was a fall risk; was incontinent of bowel and bladder; suffered from hypertension, depression, osteoporosis and severe back pain; and needed assistance showering, dressing and grooming. The respondent was aware of the petitioner's impairments but determined that an ALF that is staffed and equipped to take care of the petitioner's incontinence, falls, etc., could meet her needs.

The hearing officer determined that the burden of proof was on the agency when an action is taken to terminate benefits received by the recipient. After examining Federal Regulations at 42 C.F.R. §§ 431.206, 431.210, 431.211 and 431.230 for state plan Medicaid, the hearing officer determined that a 10-day advanced notice must be given before the date of action, and if timely appealed, the agency may not terminate or reduce services until a decision is rendered by the hearing officer. The hearing officer noted that that American Eldercare is an HMO or managed care organization contracted by the respondent (AHCA) to manage the individual's care under the LTCDP Medicaid Waiver Program and after examining Federal Regulations C.F.R. §§ 438.404, 438.408 and 438.420 concluded that the notice requirements for Medicaid HMOs mirror the state plan Medicaid requirements.

Based on the above authorities, the hearing officer concluded that Medicaid and Medicaid HMOs are both required to give advance notice before termination of coverage. Additionally, because the original notice of termination issued by AHCA was not presented at the hearing, the hearing officer concluded that the agency did not meet its burden to show that an advanced notice was issued (with notice of hearing rights) prior to American Eldercare's termination of coverage on Feb. 28, 2009. Consequently, the hearing office found that American Eldercare was paid a capitated amount for the petitioner's care for February 2009 and ordered the company to pay the petitioner's nursing home charges for that month.

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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Cross-Examination of Vocational Experts
Richard A. Culbertson, Esq., Law Offices of Richard A. Culbertson, Orlando
Luis Gracia, Esq., Rue, Ziffra and Caldwell, Port Orange
Carmen Love, Esq., Law Office of Carmen Love, Longwood
Dr. Flora Pinder, CRC, CVE, ABVE Pinder Rehabilitation Services, LLC, Altamonte Springs

12:00 p.m. – 1:30 p.m.
Lunch (on your own)

1:30 p.m. – 3:00 p.m.
Cross-Examination of Medical Experts: Part I
James Auffant, Esq., Law Office of James Auffant, Longwood
Richard A. Culbertson, Esq., Law Offices of Richard A. Culbertson, Orlando
Luis Gracia, Esq., Rue, Ziffra and Caldwell, Port Orange

3:00 p.m. – 3:15 p.m.
Break

3:15 p.m. – 4:15 p.m.
Cross-Examination of Medical Experts: Part II
James Auffant, Esq., Law Office of James Auffant, Longwood
Richard A. Culbertson, Esq., Law Offices of Richard A. Culbertson, Orlando
Luis Gracia, Esq., Rue, Ziffra and Caldwell, Port Orange

4:15 p.m. – 4:45 p.m.
Questions That Will Strengthen a Potential Appeal
Sarah Bohr, Esq., Bohr and Harrington, Atlantic Beach

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