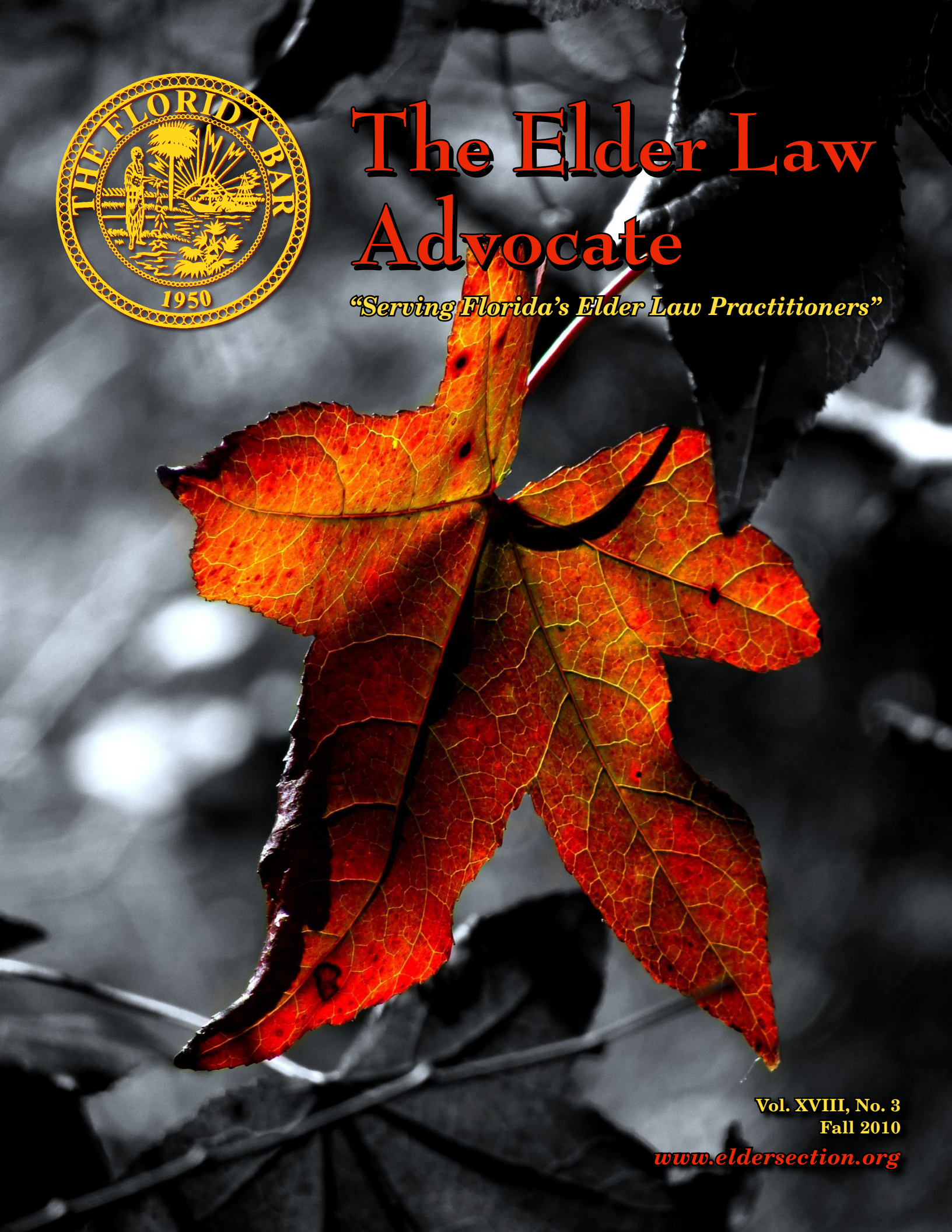

The Elder Law Advocate

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COVER ART

"Leaf" photo by Jenn Weitzel

Karol Hausman, Sosnik & Finchum LLP, Clearwater

Contents:

The deadline for the spring ISSUE is MARCH 1, 2011. Articles on any topic of interest to the practice of elder law should be submitted via email as an attachment in MS Word format to Patricia I. "Tish" Taylor, Esquire, *pit@mccarthysummers.com*, or call Arlee Colman at 800/342-8060, ext. 5625, for additional information.

On obligation and opportunity

Message from the chair

Leonard A. Mondschein

This year it is both an honor and a privilege to serve as chair of the Elder Law Section of The Florida Bar. I recognize the enormous responsibility of being chair of a section with so many talented and dedicated members working to improve the quality of life for our elders and people with disabilities. I also recognize that with every new obligation comes opportunity. As chair, I have the opportunity to form new committees to address myriad issues as they arise throughout the year and to encourage those already involved in the section's work to reach even further to achieve their goals. However, the obligation I take most seriously, and for which I have the greatest opportunity, is to increase the number of members of the Elder Law Section participating in the section's leadership.

For those of you reading this article who have not yet assumed an obligation, such as serving on one of our many committees, teaching a CLE or writing an article for the *Advocate*, consider these tasks as great opportunities. You may ultimately be responsible for changing the law and, as a result, improving the lives of Florida's elderly and disabled citizens. Here are some examples of those who have turned obligations into great opportunities.

In October, Enrique Zamora and Ellen Morris co-chaired the Elder Law Section Retreat at the Eden Roc Hotel in Miami Beach. The CLE portion of the event included such great speakers as Richard Milstein, Nancy Guffey-Landers and Ken Goodman for the morning sessions and an afternoon of Hot Topics moderated by Howie Krooks. The panel included Martin Cohen, Beth Prather, Emma Hemness, Randy Bryan and Beth Prather. The attendees included many Elder Law Section members as well as local probate and guardianship attorneys. These attorneys were introduced to areas of law such as Medicaid and VA benefits, thus increasing their knowledge base as well as interest in the Elder Law Section. The retreat was attended by Administrative Judge Maria M. Korvick of the Dade County Probate Court and Judge Arthur Rothenberg. The networking lunch was attended by 90 guests, and the evening reception included law students from area law schools. In addition to our annual sponsors, The Centers, EPIC and Guardian Pooled Trust, we had a record number of local sponsors, which included Coral Gables Trust, Great Blue Real Estate Marketing, BNY Mellon Wealth Management, Lydian Bank & Trust, Miami Jewish Health Systems, Sabadell United Bank, Sterling, Wells Fargo Private Bank and Zamora and Hillman.

While so many were responsible for making this a great retreat, none of this would have been possible without the guidance and expertise of our program administrator, Arlee Colman. We clearly have the best program administrator employed by The Florida Bar.

I would also like to thank Randy Bryan and Steve Kotler for co-chairing the Public Policy Task Force and all members of the task force. As a result of their hard work, the Elder Law Section and The Academy of Florida Elder Law Attorneys (AFELA) have a seat at the table with the Department of Children & Families in shaping policy in the Medicaid area and are able to meet with the Department of Elder Affairs (CARES UNIT) to resolve problems affecting elder law attorneys. While the members of the Public Policy Task Force contribute hundreds of hours a year to make all this happen, the results would not be possible without the financial support of the members of the Elder Law Section and AFELA. If you have not contributed to the task force recently, I invite you to do so now. The members of the task force work tirelessly and unselfishly to benefit all elder law attorneys, and they need your support.

A few months ago, I was informed that a theft had taken place regarding a special needs trust and that there were questions regarding the administration of a particular pooled trust. Carolyn Sawyer, as chair of the Abuse & Exploitation Committee, stepped up to chair an Exploitation by Pooled Trust Professionals Subcommittee, and Steve Taylor volunteered to chair a Special Needs Trust Fund Security Subcommittee of the Special Needs Trust Committee chaired by Travis Finchum. The Elder Law Section now has an opportunity to advise judges and attorneys about best practices in individual trustee appointments as well as pooled trust due diligence. We should all be very proud that the Elder Law Section has taken the lead on these two issues.

Working with other sections of the Bar on joint committees was a goal of our past chair, Babette Bach. This year, she has formed a joint committee with the Health Law Section of the Bar on Health Care Reform. Each month the committee meets, with one member from either the Health Law Section or the Elder Law Section presenting one part of the new law. Understanding each section's point of view has fostered a closer bond between those who represent providers and those who represent individual clients. Joan Nelson Hook co-chairs the committee for the Elder Law Section.

Speaking of cooperation with other sections, I would like to recognize Charlie Robinson, Marjorie Wolasky, Robert Morgan and Steve

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Message from the chair
from preceding page

Kotler for their work with the Real Property, Probate and Trust Law Section (RPPTL) of the Bar this year. They have worked on such projects as amending the power of attorney statute and forming an ad hoc Committee on Creditor's Rights. They will be called upon to work on proposed legislation to be introduced by the RPPTL Section this year, and I am confident they will be successful.

I would like to thank David Hook, our CLE chair, for organizing the leadership needed to create the quality programs the Elder Law Section provides. Whether you are a new attorney or an experienced practitioner who needs some specific knowledge in a particular area, consider attending a telephonic program organized by Jason Wadell. The speakers he taps for these programs are the best in their fields of practice and will increase your knowledge.

Recognizing that embracing elder law as a practice may start while in law school, Alex Cuello, chair of the Law School Liaison Committee, has encouraged law students to attend Elder Law Section events by offering free membership in the section for all law students. What a great opportunity to encourage new lawyers to become members of our section!

Thanks again to all of you I have mentioned and to all others who have worked to make our section successful. Let us all make this a great year.

New reverse mortgage product may help seniors

by Daniel A. Burzynski

As of Oct. 4, 2010, there is a new option in the area of reverse mortgages. Federally insured reverse mortgages have been offered under the name HECM (home equity conversion mortgage) loans. The U.S. Department of Housing and Urban Development (HUD) and the Federal Housing Administration (FHA) have introduced a new program called HECM Saver. Designed as a closing-cost saver, HECM Saver is an option to the existing HECM program called HECM Standard.

HECM Saver trades off some of the borrowing power in exchange for lower up-front closing costs. Specifically, HECM Saver saves on one particular closing cost, the initial mortgage insurance premium (MIP). MIP represents the amount paid by the borrower to insure against the possibility that the value of the property will not be sufficient to cover the amount of the debt. Once a remote possibility, the "upside down" home loan has become a frequent occurrence, even on the supposedly sheltered reverse mortgages.

HECM Standard will continue to charge MIP at the rate of 2 percent of the maximum claim amount. On a loan with the maximum of $300,000, this would translate to a fee of $6,000. With the HECM Saver, the MIP charge is 0.01 percent. On a $300,000 loan, the MIP charge would be $30. As is true of all reverse mortgage costs, the MIP fee is collected up front. Sometimes the homeowner may elect to pay closing costs up front. More commonly, the homeowner elects to use the borrowing power of the reverse mortgage to wrap in the closing costs with the other borrowed funds.

The savings is achieved by reducing the maximum loan-to-value ratio. According to HUD No. 10-205, the amount the borrower can finance will be reduced approximately 10 to 18 percent. The plan is to reduce risk to the FHA insurance fund by reducing the principal limit or the amount of money available to a borrower. Therefore, for seniors who have been deterred by high closing costs, the HECM Saver program should allow at least one of the closing costs to be substantially eliminated.

Obviously the HECM Saver results in a much lower MIP cost to the borrower. However, the other fees and closing costs are unaffected by the HECM Saver. Therefore, if the lender is charging points, or loan origination fees, the overall borrowing cost can still be substantial. Costs such as appraisals, title insurance, document preparation, surveys, etc., will also be unaffected.

HECM Saver is available for new reverse mortgages or for any pending loan that was originally HECM Standard. HECM Saver can be used with adjustable or fixed interest rate plans. HECM Saver can also be used with all five payment plans: tenure, term, line of credit, modified tenure and modified term.

For elder lawyers, it is better to have more options for clients who are considering a reverse mortgage. Substantial savings will be achieved on overall closing costs due to the change in the prepaid MIP. Obviously the client's overall financial situation will still need to be examined in light of the program choices now available. Our advocacy for our clients can help guide them to appropriate choices.

Daniel A. Burzynski *received his BA and JD from Emory University. Licensed to practice in both Florida and Georgia since 1987, he is also a Department of Veterans Affairs accredited attorney and a member of AFELA, NAELA and the Life Care Planning Law Firm Association.*

(Article submitted on behalf of the Financial Products Special Committee.)

Why the Hispanic community needs us

by Patricia Fuertes Keyes

I come from a very large, tight-knit Hispanic family, and I was raised to believe that family is above all else. This is why on one Wednesday afternoon my entire life changed when my grandmother, my Ada, was told during a routine doctor's appointment that she had cancer and only three weeks to live. This was a complete shock to our entire family because, until then, my grandmother was working, driving and healthy and had no history of cancer. There are no words to describe what I felt. All I can say is that I cried for a couple of seconds as the words "cancer" and "three weeks at most" repeatedly pierced my heart. Suddenly the tears stopped. It was not time to cry; it was time to spring into action, to do all I could do to make her comfortable and to support my family. Since I knew the uphill road that lay ahead, I wanted to make sure her affairs were in order.

To my surprise and chagrin, my grandmother did not have a power of attorney, health care surrogate, will or any other estate planning document in place! I knew I had very limited time to draft these documents and to execute them before she lost capacity, and of course, no one knows exactly when that moment will be. During this time when all we wanted was to try and give her some hope, to show her how much we loved her and to make her smile, I had to ask her, among other devastating questions, "Who do you want to make decisions on your behalf when you are incapacitated? Who do you want to leave your property to? If you are dying, do you want to be kept alive by artificial means?" Those are not the questions a granddaughter wants to ask her grandmother as she lies on her deathbed, and those should not be the final moments or memories families experience with their loved ones. My grandmother's final journey began that Wednesday and ended exactly 21 days later, with her family at her side.

My family's story is just one of millions. Hispanics, in general, have a great sense of familial responsibility, especially toward their elderly loved ones. Women, in particular, believe that taking care of an elderly parent is not only their obligation, but their privilege—it is a matter of honor and duty. Because we view the role of caregiver as intrinsic in a family, we tend to accept the enormous stress, physical toll and financial expense that accompany being a caregiver as a normal part of the aging process. As a result, many Hispanics feel immense guilt and shame when taking care of a loved one becomes too much for them to handle. This is particularly true for caregivers caring for loved ones who suffer from dementia. As the dementia progresses and caring for a loved one becomes increasingly difficult, Hispanics still tend to view the related stress as a normal part of aging, unrelated to the disease. As a result, Hispanics may not begin to seek help until they are completely overwhelmed or depleted financially. Therefore, they might not consider pre-planning until they are well into crisis mode.

Hispanics may not begin to seek help until they are completely overwhelmed or depleted financially. Therefore, they might not consider pre-planning until they are well into crisis mode.

I often wonder what would have happened if things had been different in my Ada's case. Had she lived longer with this disease, how would her children have paid for a 24-hour aide or for a nursing home? Nursing homes in South Florida average $7,000 *per month*. Twenty-four-hour in-home care is also prohibitively expensive at around approximately $5,000 to $10,000 per month. They had not planned for any of these possibilities and were unaware of all their options.

Nursing homes in my family, like many other Hispanic families, are a taboo subject. We always say "I'm never putting my parents in a nursing home." However, like most second-generation Americans, most Hispanic families are two-income households, with no one staying at home. The concept of extended families living in close proximity is also not as prevalent as it once was, with many adult children moving to other states, away from their parents. So, many families no longer have the option of having a family member stay home to care for an elderly family member. Even if one of the family members decides to be a caregiver, there most likely will come a point when he or she, as a layperson, cannot provide the adequate level of care the elderly loved one requires. For example, after only two weeks, we could no longer continue to care for my Ada without professional help.

There is a great need for education, particularly among minorities, regarding the needs of our aging population. Many of the elderly Hispanics alive today are first-generation immigrants and are unaware of the public benefits that exist for the long-term care of the elderly. For example, according to the Alzheimer's Association's 2010 Alzheimer's Disease Facts and Figure publication, in 2010, whites constitute about 80

percent of the U.S. population aged 65 and older, African-Americans constitute about 9 percent and Hispanics constitute about 7 percent. In 2050, however, it is expected that whites will constitute a smaller proportion of the elderly population at 59 percent, African-Americans will constitute a larger proportion at 12 percent and Hispanics will constitute a much larger proportion at 20 percent.

For first-generation immigrants, the notion of quality long-term care for people of limited means, or even for middle class families, is a fanciful one. They are familiar only with long-term care programs in their countries of origin, where usually the quality of care you receive depends on your economic class. This preconceived notion is also part of the reason many Hispanic families are the caregivers for their elderly loved ones—they do not want their parents or grandparents to be in substandard facilities where they are not being cared for adequately.

In addition, language barriers, distrust of outsiders, less access to health insurance and other socio-economic factors contribute to Hispanic families not benefitting from benefits and services that can greatly assist caregivers and their loved ones. However, the main problem is the lack of information and education regarding the programs, public benefits and services in our country that are available to seniors and their families, regardless of their economic status.

Second-generation children are less tied to "the old country" but are still woefully unaware of the need to plan or of the public benefits available. It is imperative that every person has properly drafted and updated advanced directives as well as a long-term care plan in place.

I thank God my Ada's ordeal was over in only 21 days because the last thing she wanted was to be confined to a bed, without the ability to live life on her own terms. Like many others, our family was not prepared, even though we have a large and strong support system. During those 21 days, there were at least 20 family members at my Ada's house, cooking, cleaning and caring for her. Those 21 days have marked me forever.

Losing a loved one is never easy, but if families have a long-term care plan in place, maybe their "21" can be completely devoted to their loved ones and not on legal and financial matters. The Hispanic population desperately needs the services and education we have to offer.

***Patricia Fuertes Keyes, Esq., LLM**, is a distinguished attorney on staff with the Law Offices of Alice Reiter Feld PA and actively practices in both Broward and Palm Beach counties. In addition to a juris doctorate, Ms. Keyes holds a Master's of Law in estate planning. Her undergraduate degrees include a Bachelor of Arts in international studies and French. Mrs. Keyes is fluent in French and Spanish. She is a member of the Elder Law, Real Property Probate and Trust Law and Tax sections of The Florida Bar and the Broward County Bar Association.*

Member news


H. O'NEILL

Holly O'Neill earns dual board certifications

Holly M. O'Neill of Miller & O'Neill PL in Boca Raton recently became one of only nine attorneys in Florida to achieve dual board certifications by The Florida Bar in wills, trusts and estates and in elder law. Ms. O'Neill also has her LLM in taxation.


N. MELBY

Nicola J. Melby joins McGuire, Wood & Bissette PA

Nicola J. (Boone) Melby has joined the firm McGuire, Wood & Bissette PA and is accepting clients at the firm's new Brevard, N.C., office and at its Asheville headquarters. As a member of the firm's Elder and Special Needs Law Team, Ms. Melby's practice areas include elder law and special needs trusts, estate planning and administration, and guardianships and counseling for disabilities.


E. MORRIS

Ellen Morris is Florida Super Lawyer and *Florida Trend* Legal Elite

Ellen S. Morris, Esq., has been included in *Super Lawyers South Florida* 2010 edition and named to *Florida Trend's* 2010 Legal Elite. Ms. Morris is a partner of Elder Law Associates PA, with offices in Boca Raton, Aventura, West Palm Beach and Weston.


P. WEINSTEIN

Congratulations to Philip M. Weinstein

Philip M. Weinstein has recently accepted a position with Star of David Funeral Home & Cemetery of the Palm Beaches and IJ Morris Funeral Directors as an area general manager of operations within the South Florida Jewish Group of SCI Funeral Services of Florida, which total 10 funeral chapels and six cemeteries located throughout South Florida.

Update: Lighting the Way to Guardianship and Other Decision-Making Alternatives

by Travis D. Finchum


T. FINCHUM

The program Lighting the Way to Guardianship and Other Decision-Making Alternatives has been a huge success. Assembled by professional partners and funded with a grant from the Florida Developmental Disabilities Council, the program has completed its second year and is set for its third and final year next summer. The program is a result of the collaboration of representatives from the FVDD Council, the Agency for Persons with Disabilities, the Advocacy Center for Persons with Disabilities, the Office of the Public Guardian, the Statewide Public Guardianship Office and the Guardian Pooled Trusts.

The annual program consists of six statewide workshops with two programs in each of three cities. The first workshop in each city is for professionals, such as attorneys and judges, dealing with guardianship and guardianship alternatives. The second day at each location is for families of individuals with disabilities. The program is free to families. The program consists of extensive written materials and a full-day, eight-hour workshop with interactive activities tailored to the audience. There are also web-based training modules for families to access from their homes at any time throughout the year.

The focus of the program is to explore guardianship in depth as well as alternatives to the legal guardianship process. One goal for this program is to make both professionals and families aware of the various alternatives to Chapter 744 guardianship, including guardian advocacy under Chapter 393, health care proxies, health care surrogate, powers of attorney and special needs trusts.

The program begins with fundamental concepts regarding civil rights and self-determination. The principles of person-centered planning, least restrictive alternatives and environments, informed consent, substituted judgment and best interest are discussed in depth. These principles are illustrated through personal stories from a self-advocate and from family members of individuals with disabilities.

Options for providing decision-making assistance are explored from the least restrictive to the most restrictive options. The nine options explored in depth are (from least to most restrictive): 1) making own decisions; 2) banking services including joint accounts and POD accounts; 3) power of attorney; 4) representative payee for government assistance programs; 5) advance directives; 6) medical proxy; 7) trusts; 8) guardian advocacy; and 9) guardianship.

The program has been a huge success, reaching more than 1,000 families and professionals in its first two years. All of the workshops filled up during preregistration and had to manage a waiting list. Reviews from those attending these programs have been outstanding, averaging over 4.5 on a 5-point rating system. The materials alone have received rave reviews.

Several faculty members presented an abbreviated version of the program at the annual judge's conference in late July. Many probate and guardianship judges commented on the helpfulness of the program in opening their eyes to the various alternatives they should consider to guardianship, including an appreciation of the discussion of the various types of special needs trusts.

The written materials from the programs for families are free to the public through the Florida Developmental Disabilities Council at *www.fddc.org/publications*. These materials can be ordered in bulk and shipped for free directly to your office for dissemination to your clients. Keep an eye out and register early for the programs to be offered next summer throughout the state. Also encourage your clients and referral sources to attend the workshops. You will have a better informed client, which will make your job easier. The website for the program is *www.guardianshiptraining.com*.

Travis D. Finchum *is a board certified elder law attorney practicing in Clearwater, Fla. He chairs the Elder Law Section's Special Needs Trust Committee. His practice consists of special needs trust administration, Medicaid eligibility and estate planning for families with special needs. He served on the faculty this year for the Lighting the Way to Guardianship and Guardianship Alternatives program sponsored by the Florida Developmental Disabilities Council.*

The issue of standing in guardianship litigation

by Enrique Zamora


E. ZAMORA

As litigation becomes more prevalent in guardianship proceedings, it is necessary to understand who has standing to litigate. The Florida Supreme Court has repeatedly stated that "[s]tanding is a legal concept that requires a would-be litigant to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings."[1] In guardianship proceedings, it is not unusual to find relatives that believe they are entitled to participate, simply because they are somehow related to the ward. This cannot be further from the truth. The Florida Supreme Court has stated that "a party does not possess standing to sue unless he or she can demonstrate a direct and articulable stake in the outcome in the controversy."[2] For example, in a case where a child of a ward is the appointed guardian, it is clear that another child has standing to challenge the actions of the guardian. On the other hand, a brother of a ward may not have standing to challenge the actions of the son as guardian.

Let's step back for a second and look at who is entitled to notice in a proceeding to determine incapacity, which is the usual beginning of a guardianship case. In F.S. §744.331(1), it is clearly stated that the notice of filing and copies of the petition to determine incapacity and petition to appoint a guardian must be served upon all next of kin identified in the petition.[3] This introduces a new term: "next of kin." Who are the relatives of the ward that are to be considered next of kin? For an answer to that question, we go to F.S. §744.102(14), where we find that next of kin is defined as "those persons who would be *heirs at law* of the ward or alleged incapacitated person *if the person were deceased* and includes the lineal descendants of the ward or alleged incapacitated person."[4] Clearly, all descendants of the ward must be considered next of kin, but what about the siblings? In a case where there is at least one surviving child, the heirs at law will be limited to the children, and the siblings will not be considered next of kin. Therefore, in accordance with these two statutes, the siblings of the alleged incapacitated person would not be entitled to receive notice of the petition to determine incapacity. This seems to answer the question of who is entitled to notice on a petition to determine incapacity, but what about other pleadings? The Florida Probate Rules' definition of "service" states that "every petition or motion for an order determining the rights of an interested person and every other pleading or paper filed in that particular proceeding which is the subject matter of such petition or motion shall be served on interested persons."[5]

This begs the question: "Who is an interested person?" We find the definition of an interested person in F.S. §731.201(23), which states that an interested person is "one who reasonably can be expected to be affected by the outcome of the particular proceedings involved. The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose and matters involved in any proceedings."[6] It is reasonable to conclude that individuals who are neither "next of kin" nor "heirs at law" and who cannot reasonably expect to be affected by the outcome of a proceeding are not interested persons and thus have no standing.

One of the most important cases regarding standing to participate in guardianship proceedings is *Hayes v. Guardianship of Thompson,* 952 So.2d 498 (Fla. 2006), recently decided by the Florida Supreme Court. The surrounding facts dealt with the guardianship of Mae E. Thompson, who, under a petition filed by the Department of Children and Families, was removed from her nephew's home due to poor living conditions. The guardianship proceedings involved significant financial issues regarding the mismanagement of Ms. Thompson's money, and during the proceedings, Ms. Thompson's court-appointed counsel filed a petition for attorney's fees. Neither the guardian nor the monitor objected to the fee request; however, counsel for petitioners objected. The primary issue was to determine whether standing to participate in guardianship proceedings is limited to the guardian and the ward or whether it extends to other parties. The court held that "a person, including an *heir of the ward*, has standing to participate in guardianship if the applicable provisions of either the Florida guardianship law or Florida Probate Rules entitles a person to notice of the proceedings or authorizes a person to file an objection in the proceeding."[7] The court's inclusion of an "heir of the ward" reiterates the notion that "next of kin" and "heirs at law" certainly have standing. The court went on to require that those persons who have knowledge of the proceedings, and may be considered interested persons, must file a request for pleadings to be entitled to receive copies of any pleadings in the case.[8]

Although we have discussed several factual scenarios regarding the issue of standing, the most controversial are proceedings involving the removal of a guardian. Consider the following: A widowed elderly ward has one living son. The ward's sister

continued, next page

Issue of standing
from preceding page

and niece are attempting to remove the ward's court-appointed professional guardian and allege standing based upon a Declaration of Preneed Guardian that has been superseded by a subsequent declaration. Before executing the subsequent declaration, the ward was examined by a licensed psychologist who found the ward to have testamentary capacity. This latter document removes the ward's sister as guardian and instead names his son. Incidentally, a new will was executed concurrently with the declaration, which includes neither the niece nor the sister as beneficiaries. Proceedings for removal of a guardian under F.S. §744.477 states "removal of a guardian may be instituted by the court, by any surety or other interested person, or by the ward."[9]

Applying these facts, familial status as a sister or niece does not make them interested persons, and the only interested person is the son, who is next of kin. The sister and the niece cannot reasonably expect to be affected by the outcome of the proceedings and thus do not have standing; at least that was the finding by the court. In brief, for a person to be able to have standing to participate in guardianship proceedings, including adversarial proceedings such as the removal of a guardian, the person must be an interested person and must be next of kin of the alleged incapacitated person as defined under Chapter 744 of the Florida Statutes.

The issue of standing in guardianship proceedings requires special attention, especially with issues related to notice, service and removal of a guardian. One must tread carefully when distinguishing who is entitled to have standing when coming across terms such as "interested person," "next of kin," "heirs at law" and "lineal descendants." Every aspect of guardianship litigation calls for a distinct definition of standing. Thus, only a careful reading and understanding of the related statutes and case law can provide you with what you need to tackle the issues presented.

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

Endnotes:

1 *See Hayes v. Guardianship of Thompson,* 952 So.2d 498,505 (Fla. 2006).

2 *Brown v. Firestone,* 382 So. 2d 654, 662 (Fla. 1980).

3 Fla. Stat. §744.331(1) (2010).

4 Fla. Stat. §744.102(14) (2010) (emphasis added).

5 Fla. Prob. R. 5.040.

6 Fla. Stat. §731.201(23) (2010).

7 *Hayes,* 952 So.2d at 500 (emphasis added).

8 *Hayes,* 952 So.2d at 508.

9 Fla. Stat. §744.477 (2010).

MARK YOUR CALENDAR!

January 13 - 14, 2011
ELDER LAW CERTIFICATION REVIEW COURSE
Reunion Resort, Orlando, Fla.
SECTION EXECUTIVE COUNCIL MEETING
Wednesday, 6:30 - 8 p.m.

* * *

March 31, 2011
FUNDAMENTALS OF ELDER LAW
Hilton, Ft. Lauderdale Marina

* * *

April 1, 2011
PUBLIC BENEFITS – WEBCAST
Hilton, Ft. Lauderdale Marina

* * *

April 26 - 30, 2011
ELDER LAW SECTION BELIZE TRIP
Belize Yacht Club

* * *

June 24, 2011
THE FLORIDA BAR ANNUAL CONVENTION
Gaylord Palms, Orlando, Fla.
Section Chair's Training – 11 a.m.
Awards Luncheon – 12 noon
Section Executive Council Meeting – 2 p.m.

* * *

October 6 - 8, 2011
THE ELDER LAW SECTION RETREAT
The Breakers, Palm Beach, Fla.

* * *

Belize Asset Protection Trust Act: Its origins, design and purpose

by Glenn D. Godfrey

The enactment of the Belize Asset Protection Trust Act of 1992 was a much anticipated event. Word had gotten around that a new piece of trust legislation was in the works in Belize, and a great deal of enthusiasm was generated by the prestigious names associated with its creation. Mr. Milton Grundy, president of the International Tax Planners Association, and Dr. Phillip Baker of Gray's Inn Chambers in London, led a blue ribbon panel of draftsmen, including Allen & Overy in London and several tax and estate planners in the United States, in designing the act.

The Trust Act itself was well received. Reviewers were enthusiastic. One review described it as "perhaps the most advanced trust legislation in the world," and for many practitioners, Belize became the jurisdiction of choice for domiciling asset protection trusts. For all its apparent success, however, the Belize Asset Protection Trust Act of 1992 remains largely misunderstood technically by practitioners (and in particular its offshore asset protection provisions). It is not uncommon, for instance, for commentators, especially those doing fairly superficial reviews, such as multi-jurisdictional comparisons, to list Belize as a jurisdiction that has not repealed the so-called "law of fraudulent conveyances" as it relates to trusts created in Belize. In fact, the exact opposite is true; the Belize Trust Act expressly excludes the operation of this law. This, moreover, is just one of the many misconceptions that have gained currency regarding the act and its operations; other examples abound.

The misconceptions are, however, entirely understandable, arising as they do out of two complicating circumstances. The first is that the Trust Act presupposes an intimate familiarity with the common law and statutory background against which it was enacted. The second is that the innovative approach that the drafters adopted is so straightforward that it disorientates many practitioners.

To understand, for example, how the act deals with the issue of fraudulent conveyances, it is necessary first to appreciate that the law of fraudulent conveyances was not and is not now a part of English Common Law as it was received in Belize. The law of fraudulent conveyances is entirely a creature of statute. At Common Law, a transfer of property could not be set aside on the grounds that it was effected to defeat the claims of creditors. It took an Act of Parliament, acting under the persuasion (some would say "duress") of powerful banking interests, to grant creditors this remedy. The Statute of Elizabeth, as it is now called, created the first fraudulent conveyance law in 1571.

One review described it as "perhaps the most advanced trust legislation in the world," and for many practitioners, Belize became the jurisdiction of choice for domiciling asset protection trusts.

To exclude the operations of the law of fraudulent conveyances, therefore, it is not necessary to amend or exclude any of the common law; it is necessary to exclude only the operations of this particular statute. In Belize, the relevant provisions of the Statute of Elizabeth were re-enacted into Belize law by Section 149 of the Law of Property Act.

The Belize Trust Act expressly excludes trusts created in Belize from the operations of this Section. Subsections (6) and (7) of Section 7 of the Asset Protection Trust Act provide as follows:

> 7(6) where a trust is created under the law of Belize, the court shall not vary it or set it aside or recognize the validity of any claim against the trust property pursuant to the law of another jurisdiction or the order of a court of another jurisdiction in respect of:
>
> the personal and proprietary consequences of marriage or the termination of marriage;
>
> succession right (whether testate or in-testate) including the fixed shares of spouses or relatives; or
>
> the claims of creditors in an insolvency.

Subsection (6) above shall have effect notwithstanding the provisions of Section 149 of the Law of Property Act, Section 42 of the Bankruptcy Act and the provisions of the Reciprocal Enforcement for Judgments Act.

As noted earlier, Section 149 of the Belize Law of Property Act (which is excluded by Section 7(7) of the Asset Protection Trust Act) re-enacts the provisions of the Statute of Elizabeth. To a reader familiar with the statutory and common law background against which the Belize Trust Act was enacted, it is immediately obvious, therefore, that a trust created under the law of Belize is excluded from the provisions of the law of fraudulent conveyances (as regards claims arising under any foreign law).

Subsection (2) of Section 7 of the Asset Protection Trust Act is

continued, next page

a further source of misconception amongst practitioners. This section provides that a trust shall be invalid and unenforceable to the extent that the court declares that the trust was established by duress, fraud, mistake, undue influence or misrepresentation. A reader familiar with the law of Belize will recognize that "fraud" in this context means "an action of deceit at common law." It is distinct from the statutory provisions originally enacted in the Statute of Elizabeth and now contained in the Belize Law of Property Act, which render voidable voluntary conveyances made with intent to defeat creditors.

The other circumstance that has resulted in misconceptions regarding the Belize Trust Act is, as noted, the radical and innovative approach of the drafters of the act. Practitioners who are familiar with having particular issues addressed in a particular way in the trust legislation of other jurisdictions are disoriented by Belize's departure from traditional solutions.

Thus, for example, most of the offshore asset protection trust jurisdictions attempt to deal with fraudulent conveyance claims by mandating a statutory limitation period and imposition of other procedural requirements for the prosecution of such claims. The period may vary from six years (the standard limitation period for most actions) to two years in the case of more aggressive offshore asset protection jurisdictions such as Nevis, the Turks & Caicos and the Cook Islands. In effect, in these jurisdictions the law of fraudulent conveyances continues to apply to trusts created in the jurisdiction, subject however to time constraints—in effect a halfway house approach.

Recent judicial decisions in the Cook Islands and the Commonwealth of the Bahamas have demonstrated the hazards of this approach. In 515 s. *Orange Grove Owners Association v. Orange Grove Partners*, the Cook Islands Court interpreted the limitation of actions provisions in its so-called "Statute of Elizabeth Override Legislation," i.e., the International Trust Act of 1984, in a way that stunned practitioners.

The case turned on the question of whether the relevant statutory limitation period started to run a) from the date the trust was created, or b) from the date on which the judgment that it was sought to enforce against the settlor was issued. The court on a preliminary application for an interim injunction held that the limitation period started to run from the latter date (enforcement action). After reversal by the high court, this decision was confirmed by the court of appeal. In delivering the decision of the court of appeal, Sir Duncan McMullin said, "It should not be lightly assumed that Parliament intended to defeat the claims of creditors by allowing international trust to be used to perpetuate a fraud against a creditor."

The court also commented: "We would be loathe to interpret the International Trusts Act as a statute which was intended to give succor to cheats and fraudsters by totally excluding the legitimate claims of overseas creditors. We cannot think that Parliament ever intended that by passing the International Trusts Act the Cook Islands should become the Alsatia in the South Pacific from which the commercial comity of nations was completely ousted." This dicta, particularly the reference to "cheats and fraudsters," suggests that the learned judge of appeal failed to distinguish in his mind between common law fraud, i.e., deceit, on the one hand, and a transfer to defeat the claims of creditors on the other. This failure resulted, in great measure, from the halfway house approach adopted by the drafters of the (Cook Islands) International Trusts Act.

One commentator noted, "This holding goes a long way towards gutting the Cook Islands legislative scheme, because it gives creditors who first obtained a judgment in the United States the ability to sue on the judgment in the Cook Islands, without being barred by the "Statute of Elizabeth Override." The effect of this decision has been considerably mitigated by subsequent legislative events in the Cooks. Nonetheless, the case does illustrate the hazards of adopting the traditional statutory limitation period solution to the fraudulent conveyance issue.

A similar problem arose in the Bahamas, which has also adopted a halfway house approach to the Statute of Elizabeth. In *Grupe Tomas v. S.F.M. Al – Sabal, Chemical Bank & Trust (Bahamas) and Private Trust Corporation*, the case turned on the same question, i.e., whether the statutory limitation period had expired before action was brought. In refusing to discharge an interlocutory Mareva injunction against the assets of the "Bluebird Trust" (a trust created under the law of the Bahamas by one Sheikh Fahad), senior Justice Joan Sawyer said, "Aside from the fact that there is no evidence that the Bluebird Trust was established to avoid or minimize Sheikh Fahad's or his family's exposure to taxes either in England or in Kuwait, it seems to me that it is one thing to ascribe to the Parliament of the Bahamas an intention to make the Bahamas more attractive as a 'tax haven' by encouraging the establishment in this jurisdiction of what is referred to in some commercial circles as 'offshore asset protection trust.' But it is quite a different matter to attribute to Parliament an intention of allowing the Bahamas' position as a legitimate tax haven to be used as a cover for fraudulent activity which has little or nothing to do with a minimization of taxes or the protection of honestly acquired assets from the sometimes unreasonable demands placed on those assets, e.g., as a result of an award of damages against a professional person."

While senior Justice Sawyer comes much closer than does Sir Duncan to recognizing the distinction between fraud at common law and statutory conveyances, i.e., transfers to defeat the claims of creditors, the distinction is still not clearly drawn. Here, too,

the failure clearly to make this distinction arises from the decision of the Bahamas Parliament merely to limit rather than to exclude altogether the operations of the Statute of Elizabeth as it relates to trusts.

Belize, on the other hand, adopts an entirely different approach. Rather than applying a statutory limitation period to the Statute of Elizabeth provisions, it excludes these provisions altogether. In this context the question of whether the settlor intended to defeat the claims of the creditor is irrelevant. In the absence of actual fraud, i.e., deceit, in the establishment of the asset protection trust, the assets of a Belize trust cannot be attached to satisfy the judgment of a foreign court based on any foreign law. This is so even if the transfer is done with the specific intention of defeating the claims of creditors, and whether the claim and/or the judgment arose before or after the trust was created.

This unequivocal position of the Belize Legislature is of great assistance to judges who have to consider specific applications of the Belize Asset Protection Trust Act.

In *Securities and Exchange Commission v. Banner Fund International*, the U.S. SEC applied for an order to compel the trustee for a Belize trust to disclose information and surrender certain assets of the trust. On the substantive hearing of the application, the Supreme Court of Belize refused the order on the ground (inter-alias) that the application contravened the relevant provisions of the Belize Asset Protection Trust Act.

Justice Traodio J. Gonzales noted, "… the Asset Protection Trust Act goes to great lengths to reserve jurisdiction over Belize trust to the Belize courts. Section 7(2) of the act provides that only a Belize court has the power to declare a Belize trust invalid. By Section 7(6), Belizean trusts are granted specific immunity against the judgments of foreign courts or claims based on the law of any foreign jurisdiction. In a jurisdiction such as Belize, which offers international investors confidentiality and protection of their assets against foreign litigants and which has passed law towards those ends, it is important that judges, mindful of the Legislature's intention as set out in the law, support these principles of confidentiality, inviolability and exclusivity of jurisdiction."

Clearly, a Belize judge, buoyed by the unequivocal exclusions of the operations of the Statute of Elizabeth that obtains in the Belize Act, can afford to be bolder in rejecting "fraudulent conveyance" claims based on foreign law than can his colleague in jurisdictions that merely limit rather than exclude altogether the statute.

Understanding the operations of the Belize Asset Protection Trust Act (and particularly its asset protection features) requires both detailed knowledge of the legal background against which the legislation was enacted, and the careful study of those features of the act that depart from traditional solutions. As recent judicial decisions have demonstrated, however, the advantages conferred by the Belize Asset Protection Trust Act may well be worth a detailed study of its innovations.

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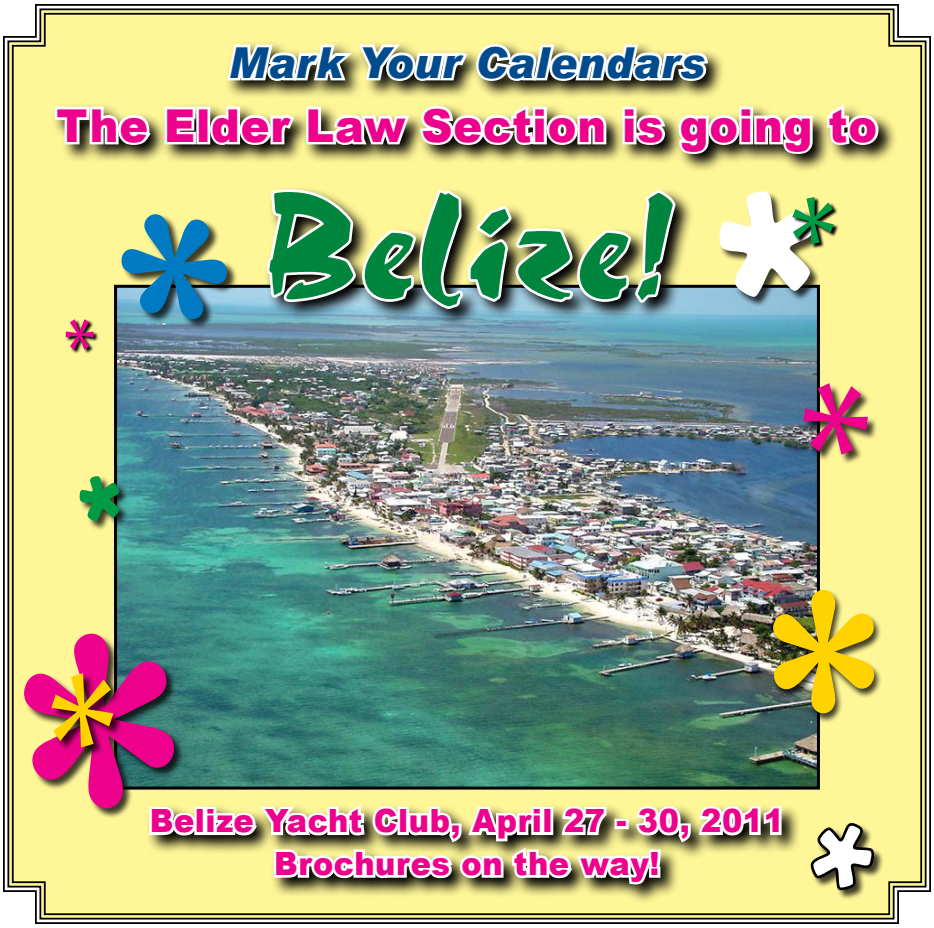

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2011: Medicare changes & health care reform

by Shannon Martin

Since most of us work largely with Medicare recipients, this article will highlight some of the health care reform provisions that affect the Medicare program as well as some of the general changes coming to Medicare in 2011 and beyond.

Preventive services

Next year, all Medicare preventive services, such as screenings for colon, prostate and breast cancer, will be free. Annual wellness visits will also be free starting in 2011. In the past, Medicare allowed for a one-time "welcome to Medicare" wellness/physical only.

Durable medical equipment

In certain areas, recipients will be required to go through specific providers.

'Doughnut hole' changes/Medicare prescription drug benefit

2010: Anyone who fell into the "doughnut hole" received a $250 rebate check to assist with those costs. This doesn't apply to those receiving "special assistance" with costs through Social Security. Be aware that there have been several scams related to this rebate where clients are asked for their Medicare numbers or contacted via phone to sign up for a new plan.

2011: 50 percent discount is offered on covered brand name drugs in the doughnut hole period.

2012-2020 and beyond: This discount incrementally increases until eventually the coverage gap is eliminated.

New open enrollment periods/ dates to change plans

1/1/11-2/14/11: If you're in a Medicare Advantage Plan, you can leave your plan and switch back to original Medicare (and join a prescription drug plan) with coverage effective the first day of month after the plan gets your enrollment.

10/15/11-12/7/11: New open enrollment period for switching Medicare health and prescription drug plans (effective 1/1/12). *This is the period that has previously been 11/15 to 12/31 each year (including 2010)—the purpose is to allow more time for decisions as well as processing before the effective date.*

Health care information technology

There is a big push toward use of information technology to streamline and improve health care, such as electronic prescribing and personal health records. Medicare has information and resources on its website, though there remains no universal system at this time.

Income-adjusted premiums

Currently, Part B premiums are income adjusted for higher income individuals. Starting in 2011, higher income individuals (those making more than $85,000 filing an individual return and $170,000 filing jointly) will also pay an income-related monthly adjustment to Part D premiums. This will be deducted from the recipient's Social Security check, no matter how he or she usually pays the Part D premium.

Medicare Advantage plans

Subsidies to these plans will be phased out. This may mean plans reduce extra benefits or even decide to no longer participate in this market, but those will be business decisions by the insurance companies, so the impact is unclear at this point.

Medicare's website (www.medicare.gov) offers great plan comparison tools and information sheets on a variety of topics and special interests. The Medicare and You 2011 Guidebook is posted there, along with recently updated cost data for 2011. Aging Wisely (www.agingwisely.com) also offers a yearly Medicare Fact Sheet, which can be obtained online or by contacting CMS for copies.

There are many sources to read about health care reform, and undoubtedly most come with their own bias and opinions on this topic. You probably have personal interest in provisions affecting businesses and individuals, depending on your health status and insurance/financial/employment situation. AARP has a lot of information that applies to Medicare beneficiaries: www.aarp.org (http://bulletin.aarp.org/yourhealth/policy/articles/reform_splash.html), and the government has numerous fact sheets, which break things down to effects on certain groups: www.healthreform.gov, www.whitehouse.org. The Center for Medicare Advocacy (www.medicareadvocacy.org) is another great site to visit, especially as you encounter specific client issues or concerns in different populations.

***Shannon Martin, MSW, CMC**, is director of communications for Aging Wisely LLC (www.agingwisely.com; 727/447-5845). Aging Wisely is a geriatric and disability care management/consultation company, helping clients and families since 1998. Aging Wisely is proud to support the Elder Law Section's Special Needs Trust Committee. Aging Wisely is offering a **new Medicare Analysis package** to help individuals make the smartest retirement health care choices. Contact Aging Wisely at 888/807-2551 or jeanninehodges@agingwisely.com for more information.*

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What the Medicare Annual Election Period should mean to the elder care advocate

by Tyrina D. Blomer

Being an attorney whose practice is in corporate health care compliance, the day-in and day-out decisions of what guidance should be provided to internal business owners are always surrounded by what is in the "best interests" of the Medicare beneficiaries we serve. With this said, the Annual Election Period, which this year runs from Nov. 15 through Dec. 31, can present its own challenges to the elder care advocate.

The Annual Election Period allows Medicare beneficiaries to select which Medicare Advantage plan (HMO, PPO, PFFS or Network FFS) and/or Medicare Prescription Drug Plan (PDP) may (or may not) be the best fit for their specific health care needs. Due to the very limited time frame, the massive marketing that may occur can be more than a little overwhelming to the typical Medicare beneficiary. Thus, it is important that we as professionals remind ourselves of what should be very important tenets of what we do daily:

1. Take the time to educate ourselves and remain current on Medicare products within the marketplace—Original Medicare, Medicare Advantage, Medicare Part D PDPs as well as Medicare Supplemental plans (Medigap policies); and
2. Be able to provide a comprehensive, personal assessment tailored to each client's needs, taking into consideration these questions:

   a. What is his or her current financial picture: What premiums, deductibles and other cost-shares may best meet budgetary concerns or constraints?

   b. What high-risk health issues does he or she have, and if none, which plans offer preventive testing with little or no cost-share to help keep the client healthy?

   c. What are his or her current or future expected prescription drug needs and use?

   d. Does he or she have future long-term care or potential hospice needs?

   e. If snowbirds or for those who have multiple residences, which products or plans may offer the same benefits and cost-shares in-network as out-of-network?

   f. What Medicare Management programs are offered by each plan that may be appropriate to the coordination of care needed for the client (e.g., diabetic or COPD programs)?

   g. What, if any, impacts could recent legislation (federal and state) have on our clients and members?

During the Annual Election Period, many Medicare beneficiaries receive massive amounts of materials and may be marketed by a plethora of Medicare Advantage and Medicare PDPs. It is imperative that we are prepared to assist them in deciding which products may best fit their current and future needs, or if remaining with their current coverage may be in their best interests. If we do not take the time to educate ourselves, we will be hard-pressed to advise them with the most accurate and up-to-date information.

Educate thine ownself first

As advocates, we cannot expect to be able to educate our clients and members unless we first take the time to educate ourselves. Here are a few suggestions of ways to educate ourselves so we will have answers to the questions that may be asked of us:

1. Call an independent agent who represents many different plans and ask for an overview of the benefit plans available in the areas of the clients you serve as well as a copy of each plan's Summary of Benefits.
2. Many plans will offer sales, marketing, educational seminars and health fairs. Take an afternoon and visit an event and collect information on plans so you can speak knowledgeably about the plans for which your clients may request information.
3. Visit a local pharmacy and pick up the brochures being distributed by multiple plans to familiarize yourself with what drugs will be offered on their formularies (This will assist in making sure your client's prescription medication needs can be met.)
4. Spend an afternoon and let your fingers do the walking on the Web. At *www.medicare.gov*, you can easily do a search, by the ZIP codes of your clients, of what plans are available in their areas. Once you locate the names of the plans available, merely visit the corporate websites and download the Summary of Benefits for each plan to use this as a resource when discussing the options with your client.
5. Take the time to review recent legislative changes that impact your clients, and assist them in taking advantage of the opportunities that may exist for them (e.g., the Medicare Improvements for

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Patients and Providers Act (Public Law No.: 110-275) and recent Health Care Reform changes, which may include, but not be limited to, the Patient Protection and Affordable Care Act (Public Law No.: 111-148).

Empower the client in the decision-making process

Sadly, as with any other industry, there may be individuals who will try to sell your clients a product that may not be in their best interests. Now is the time to send a letter to your clients, encouraging them to

1. not let anyone in their homes to provide information on these plans unless a) they already have an existing agent-client relationship and are comfortable with their present agent; the insurance agent or the insurance company has provided them with a Scope of Appointment form or telephonic attestation to such that will quantify the plans that may be marketed by the agent while in the home;
2 seek referrals from their elder care advocate, a trusted friend or a family member for an agent who can explain their options to them;
3. not sign any enrollment forms unless they know for sure a plan can meet their current and future health care needs;
4. err on the side of caution. If they feel pressured to enroll in a plan they are unsure of, either a) request the agent to come back at a later time; or b) make sure they have a family member or a friend present during the visit to assist them in the decision-making process. (As an additional note, if they have a POA, recommend that they be present during the presentation and have proof of their appointment available for the agent); and
5. take the time to educate themselves. One of the most powerful tools we have as advocates is to educate and empower our clients and members. For those who may be "uncomfortable" with the agent experience, encourage them to reach out directly and educate themselves with the tools available to them to make wise decisions based on their individual health care needs. Medicare provides numerous tools to assist in that process: the Medicare & You 2011 Handbook (available at *www.medicare.gov/publications/pubs/pdf/10050.pdf*), which is easily downloadable in a PDF format or is available in hardcopy by calling 1-800-MEDICARE; and the Medicare Plan Finder tool (available at *www.medicare.gov/find-a-plan/questions/home.aspx*), where they can take the time to understand the plans available to them in the comfort of their own homes and can then voluntarily enroll online in the plan that may best meet their needs, without the aid of an agent.

So, with the Annual Election Period upon us, this is a simple reminder that we all owe a duty to provide guidance and direction in the best interests of our clients and members, including staying current on the issues that impact our practices and the health and welfare of those we serve and represent. It is the least that we, as elder care advocates, can do.

Tyrina D. Blomer, JD, LLM, *is a member of The Florida Bar. She is vice president of compliance operations and the chief compliance officer for the Medicare Advantage Division of Universal American Corp.*

Your client is cheating on you with another lawyer

Why client loyalty is disappearing, and why your marketing (or lack thereof) may be to blame

by Rich Davis

No, you won't find lipstick on a collar or a box of love letters secretly tucked away on a closet shelf. Yet for many lawyers who have put their blood, sweat and tears into providing the best representation possible, it can genuinely sting to hear that a longtime client can now be found in the welcoming waiting room of another.

Aside from the resentment, there are the problems of lost revenue for you and lack of consistency for the client. It seems like a clear lose-lose. Yet the fact remains, one of the fastest growing and most disturbing trends during these tough economic times is the disappearance of customers' loyalty.

So why are clients, even extremely satisfied ones, "exploring their options" and abandoning their longtime attorneys for someone new? Many believe it could actually come down to marketing … or more accurately, *not* marketing.

"If a competing lawyer is stating their case in a persuasive way through advertising, PR or via the Web and you're not communicating at all, clients often see the grass as being greener on the other side," says Esther Yegelwel, a marketing consultant who helps businesses across the United States better articulate their differences to their current and potential customers. "It wasn't always this way, but today, clients don't think twice about taking their business elsewhere.

"If you're not constantly engaging current clients in a way that's relevant, you're going to see attrition—no matter how loyal your staff is," adds Yegelwel. "The key to winning new clients and keeping your existing ones is stating and restating your strengths over and over and over again."

So here are some things you should be doing to "market" to your current clients so they don't wander. (You're likely to add lots of new business in the process, too.)

Web videos and webinars

What they are: Clients typically have no idea of the full scope of services you offer. They are also probably clueless about the steps you take to ensure that each client receives the best representation possible. They might be unfamiliar with your impressive background. Web videos and webinars showcase your firm like no other marketing tool. Usually 3 to 7 minutes in length, web videos sell your current clients on additional services while wowing new clients. Viewers can forward web videos to friends, place the videos on their Facebook pages (if you want them to) and more.

Webinars are customer-oriented seminars on the Web. You or someone on staff gives a brief talk about a particular topic of interest. Clients "attend" from the privacy of their own homes or watch the webinar "on demand."

Why they're effective: People retain 87 percent of what they see but only 10 percent of what they read. So web videos and webinars stick. They can also dramatically increase your website's rank on Internet search engines. Finally, they position you as *the* expert in your field.

Typical cost: Depending on the complexity, a professionally produced web video can range anywhere from $5,000 to $15,000. (Definitely go with a pro, or the results will look like your family's vacation footage.) But the investment is truly worth it. Web videos are often a firm's "best salesperson." Webinars can be done almost for no cost although you might want to call a professional graphic designer to help with any visuals you plan on showing.

Insider's tip: Tie in your web video with something the potential client can print out. For example, if you're a bankruptcy attorney and your video is explaining various scenarios that might be involved in the bankruptcy process, have a button to the side where the site's visitor can print out a mini glossary that defines some of the technical terms or briefly recaps what is in the video. The goal is to give people something tangible with your logo and phone number on it that will sit on their desks or be passed around. Stay "top of mind" at all times, and your odds of getting that case go way up.

Online rating sites

What they are: You've probably seen or at least heard about websites where people rate their experiences with a given attorney. The problem is most people write only to complain or leave no feedback at all. These rating sites have a huge impact on decision making, so don't ignore them!

When your clients are marketed to by another law firm, there's a good chance they'll be tempted to go online and check them out. If a client sees you have no reviews or negative reviews and the other firm has glowing reviews galore, that client could be out the door forever. Even if you've done a great job, if nobody's expressing their satisfaction, clients could still leave you for someone with better reviews.

The solution is to be proactive. Encourage online grading. If you have a client for whom you've worked wonders, have your front desk person hand him or her a preprinted sheet that encourages that satisfied client

continued, next page

Cheating client
from preceding page

to leave a comment online. Clients don't feel put out; they feel honored that you cared enough to request feedback.

Why they're effective: Whether it's a restaurant or a law firm, people love to comparison shop, and ratings websites give clients the perception that they're doing just that. If you encourage satisfied clients to make their opinions known, high grades will follow. Existing clients will stay put, and new clients will flock in.

Typical cost: You'll like this. Free.

Insider's tip: One of the most effective ways to encourage grading is through an e-newsletter. (We'll get to that next.)

E-newsletters

What they are: Much like their antiquated cousin, the printed newsletter, e-newsletters let everyone know what's new at your firm, including new services, verdicts and settlements, community involvement and more. But unlike printed newsletters, there's no printing or mailing charges. Plus, it's all trackable. You can see which articles were most read, who forwarded the e-newsletter and more.

Why they're effective: Every time you send an e-newsletter, it naturally shows your business as a dynamic organization that is getting even better every day. Also, e-newsletters are instant. So if there's something you want clients to know about NOW, they will. It's not uncommon for an attorney to get a request for an appointment within 10 minutes of an e-newsletter being sent.

Typical cost: Services such as Constant Contact (*www.constantcontact.com*) typically charge around $30 per month. For your first e-newsletter, it's worth hiring a professional to help craft your message and organize your graphics.

Insider's tip: After your first e-newsletter, pay close attention to which articles were read and which were not. Then rework your next e-newsletter to be geared toward the clients' interests. Readership will go up, and forwards will increase.

The simple thank you card ... and beyond

What they are: This is one of the oldest and most effective tricks in the bag, yet few firms actually use it! These are simple thank you cards sent by you and your staff to let the client know his or her business was appreciated.

Yes, even though you are providing a service, you're not the only one in town providing it. So, show your clients their loyalty is valued, and then watch loyalty grow. Sending cards for Thanksgiving (the day for expressing gratitude) and on birthdays is easy, cheap and way too effective to put off for yet another year.

Why they're effective: Clients are becoming increasingly cynical about businesses that say they care but never actually show it. This time-tested, old-fashioned approach *demonstrates* you care. Having that line on your website that *says* you care isn't going to cut it.

Typical cost: The price of an inexpensive greeting card and a stamp.

Insider's tip: Just do it! As mentioned above, this is something a lot of firms say they're going to do, but few ever follow through. Send one today and get in the habit.

Whether you choose to bring in someone to help you with these initiatives or do it yourself, the key is to **take action**. Marketing is an easy thing to let slip to next week's to-do list since it's not an emergency. Yet it's probably the single most important long-term thing you can do for your business.

"An A+ internal marketing campaign that never gets launched does nothing to help. Just do something and get it out there," says Yegelwel. "Make it better as you go."

A lawyer-client relationship isn't unlike any other relationship. Neglect it, and it will wither. Nourish it, and it can last a lifetime with no cheating whatsoever. Now how romantic is that?!

***Rich Davis** has helped create marketing campaigns for clients such as Sheraton, Ford and Capital One Credit Cards. He is an author and speaker, and he serves as CEO of Spark Inc., a Florida-based marketing firm. He can be reached for questions or comments at rich@thinkSPARKinc.com or by calling 904/732-4391.*

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This list includes all contributions received as of Oct. 31, 2010, for the 2010 fiscal year.

When declining DIC benefits from the VA is beneficial

by Brandon Arkin and Jack M. Rosenkranz

B. ARKIN

J. ROSENKRANZ

The government provides an array of social welfare programs. Due to the varying requirements of each program, it becomes tricky to find the best combination of programs to fit our clients' needs. A growing issue is finding the right programs to provide clients with both income and payments for assisted living. Medicaid will pay a stipend for the cost of an assisted living facility. The scope of this article will center on the surviving spouse of a veteran and the benefits that can be received from both the VA and Medicaid.

For a surviving spouse of a veteran, there are two main benefits from the VA. The first is Dependency & Indemnity Compensation (DIC), a non-income based benefit. The second is Death Pension, which is a low-income-based benefit. Both of these benefits have a secondary component known as Aid and Attendance, which provides additional payments income to a beneficiary requiring assistance. The particular requirements for these benefit programs have been extensively reported in previous articles. Reader are asked to refer to these articles or VA sources if they wish to learn the precise requirements for these programs.

A claim for DIC by the widow or widower of a veteran is always also a claim for the Death Pension benefit if DIC is denied and if the service and income requirements are satisfied, as well as always a claim for any available accrued benefits. In general, if a surviving spouse qualifies for both DIC and Death Pension, DIC will be awarded as the greater benefit. However, the surviving spouse of a veteran may elect to receive the Death Pension instead if it is to the spouse's advantage, even though it is a lesser benefit. [38 CFR §§ 3.152(b); 3.702(d)(2)].

The amount of DIC payable since January 1993 has been a flat rate. The DIC basic monthly rate for a surviving spouse of a veteran is $1,154. If the deceased spouse had a 100 percent service-connected disability for at least eight years prior to death during the marriage, the amount would be $1,400. For claims made prior to January 1993, the DIC amount is based on the highest pay grade the veteran held for six months of active duty. In those circumstances, the surviving spouse of a veteran receives up to $2,643 per month. If the surviving spouse of the veteran is also eligible for Aid and Attendance, he or she can receive an additional $286 per month.

The interplay between Medicaid and Veterans Benefits

For Medicaid eligibility, benefits received from the VA are treated in different ways. A recipient of DIC has all of this benefit counted for Medicaid eligibility purposes. If the surviving spouse receives DIC and an additional amount for Aid and Attendance, only the DIC benefit is counted for Medicaid eligibility because the Aid and Attendance benefit is not counted as income. A surviving spouse in an assisted living facility might choose to forego the DIC payment and receive instead a maximum amount of Aid and Attendance of $1,056 per month. In that case, if all of the benefit is considered Aid and Attendance benefit because of need, none of the benefits received by the surviving spouse from the VA will be counted as income for Medicaid purposes.

If the surviving spouse of a veteran in an assisted living facility can meet the cost of care by paying all of his or her countable income to the facility supplemented by the stipend from Medicaid, he or she may actually have the ability in certain circumstances to spend the benefit received from the VA for Aid and Attendance on anything he or she might wish during the month received.

How to change the surviving spouse's benefit from DIC to Death Pension

The surviving spouse may elect to receive the Death Pension benefit instead of DIC if it is to his or her advantage, even though it is a lesser benefit. [38 CFR §§ 3.152(b); 3.702(d)(2)] To change from DIC to Death Pension, the surviving spouse will need to submit Form 21-534 in its entirety, Form 21-8416 Medical Expense Report, Form 21-4142 Authorization and Consent to Release Information to the Department of Veterans Affairs, the doctor's affidavit and a facility or care letter, if relevant. A simple statement requesting to change from DIC to Death Pension plus Aid and Attendance should be written in Section XII, Number 48 on Form 21-534.

Brandon Arkin *is of counsel for the law offices of Jacobi & Jacobi PA in North Miami, Fla. His practice is concentrated on elder law and family law. He is an active member of the Elder Law Section and serves on various committees for the section.*

Since 1991, ***Jack Rosenkranz*** *has concentrated his practice on elder law and veterans' rights. He became active with the Elder Law Section at the time of its formation and has served in various capacities on the Executive Council at the request of numerous section chairs. He currently serves as chair of the Veterans Benefits Subcommittee.*

Guardianship Committee

Carolyn Landon and Alex Cuello, Co-chairs

The Elder Law Section Guardianship Committee is looking into possible changes to F.S. 744.331 regarding payment of fees if the petition is dismissed but the court does not find the petition to have been filed in bad faith.

We are also working with Ellen Morris and Enrique Zamora and the RPPTL Guardianship Committee regarding proposed amendments of F.S. Sections 732.5165, 732.518,736.0207 and 736.0406 to clarify that revocation of a will or revocable trust is subject to challenge on the grounds of fraud, duress, mistake or undue influence after the testator's or settlor's death.

We are seeking new committee members for input about these proposals and their effects on guardianship. Contact Carolyn Landon or Alex Cuello as soon as possible if you are interested in joining the committee, want to voice an opinion or if you have other issues concerning guardianship you would like the committee to consider.

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* * * * *

Tax Special Committee

Martin H. Cohen, Chair

Numerous federal tax issues affect the elder law attorney's practice. Many of those issues also fit within the scope of general tax and estate planning and are covered in more depth by the RPPTL Section and the Tax Section. In the Tax Committee of the Elder Law Section, our objective is to identify unresolved tax issues that specifically affect our planning for public benefits eligibility and to provide some guidance on these matters to the section with our investigation and research.

Some of the topics we intend to cover this year include:

- Dealing with IRA accounts of the settlor and the settlor's spouse in connection with Medicaid and VA pre-planning;
- Identifying grantor trust powers for pre-planning with irrevocable trusts that will not cause DCF to claim that the trust estate is available to the settlor;
- Determining the extent to which the grantor may serve as a trustee or as a co-trustee of an irrevocable trust used for Medicaid pre-planning; and
- Evaluating to what extent annuities and escrow agreements can be used to ease the income tax impact to the care provider under a personal services contract.

Members with federal tax experience or education who are interested in participating in this committee may contact me at 954/315-0355.

Committees keep you current on practice issues

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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Email or fax the completed form to Arlee Colman at The Florida Bar at *acolman@flabar.org* or 850/561-5825 or to Jana McConnaughhay at *jana@mclawgroup.com* or 850/385-1246.

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Please check the committee(s) on which you are interested in serving. Most committees also have subcommittees dedicated to specific issues and projects.

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___ Probate
___ Other _____

Summary of selected caselaw

by Alex Cuell

Matejka , Successor Trustee v. Dulany, 35 FLW D1559a (Fla. 4th DCA 2010).

Anne Matejka appealed the entry of a final judgment for unliquidated damages on the basis of insufficient notice. Dulaney filed a complaint against Matejka for trust accounting. After Matejka abandoned her defense of the suit and moved to France, the trial court entered a default judgment in favor of Dulaney. Dulany then filed a motion for final judgment requesting a specific amount of damages. Dulany set a hearing on the motion for final judgment and provided Matejka less than 30 days' notice. The court vacated the final judgment holding that a default admits entitlement to liquidated damages but not unliquidated damages, and in this case the damages could not be determined with exactness from the trust agreement. Further, under 1.080(h)(1), a party against whom a default is entered is entitled to not less than 30 days' notice of setting a trial.

Carlin, Personal Rep. of Estate of Bebbe L. Schubot v. Javorek, 35 FLW D1566a (Fla. 4th DCA 2010).

The parties agreed that the personal representative would provide Javorek the decedent's medical records and sign any HIPAA forms for Javorek to obtain medical records. The stipulation stated that if the personal representative failed to timely provide the medical records as agreed, the court could enter an order requiring compliance and awarding attorney's fees. The trial court entered an order requiring compliance but denied attorney's fees finding the personal representative's breach of the agreement was not material and substantial. The parties appealed, each claiming entitlement of attorney's fees. The appellate reversed the trial court, holding that Javorek was entitled to fees as the prevailing party and as a special remedy under the terms of stipulation.

Gains v. DeWitt, as personal representative. 35 FLW D1595(a) (Fla. 2nd DCA 2010).

Gains was the sole beneficiary of the decedent. DeWitt was appointed personal representative pursuant to the decedent's will, and he hired counsel of his choosing. The estate had a compensable value of $190,532.44. Several days prior to the court-ordered deadline to file a final accounting, the personal representative filed an initial account instead, which listed disbursements of a commission to the personal representative in the amount of $22,215.97, payment to the attorney for $22,215.97 and no disbursements to the beneficiary. The beneficiary filed an objection to the initial accounting, which included an objection to the distribution of the commission and fee without court order. The beneficiary's counsel then withdrew the objection to the initial accounting. The court ordered that a final accounting and petition for discharge be filed within 30 days. The beneficiary's counsel filed a petition to decrease the compensation paid to the attorney and the personal representative. The court denied the motion without a hearing as to the reasonableness of the fees. The appellate court reversed, holding that although the beneficiary withdrew the objection to the initial accounting, the right to challenge the reasonableness of the personal representative's and attorney's fees was preserved and required a hearing to determine the reasonableness.

Brennan v. Estate of Edward J. Brennan, Jr. 35 FLW D1645a (Fla. 5th DCA 2010).

The decedent executed a will on May 31, 2002, leaving a home in Canada to Ruth Honsberger, who had been renting it for the past 24 years. After the testator died, his sons filed a petitioned for administration of an earlier will dated Feb. 5, 2001, which devised the estate to the decedent's four children in equal shares. The sons' petition acknowledged they were aware of the 2002 will, stating that the original copy could not be located and they believed it no longer existed. Honsberger filed an objection to the petition for administration and filed a petition to establish a lost or destroyed will. The trial judge admitted the 2002 will into probate on the testimony of Honsberger alone. The sons filed a motion for rehearing, and Honsberger presented affidavits that stated the witnesses had seen the decedent execute the will and they had signed as witnesses immediately thereafter. The sons did not stipulate to the admission of the affidavits in lieu of testimony. The motion for rehearing was denied. The appellate court reversed the trial court, holding that the evidence did not meet the statutory requirement for establishment and proof of the 2002 will through the testimony of Honsberger. The court noted that pursuant to F.S. 733.207, "[a]ny interested person may establish the full and precise terms of a lost or destroyed will and offer the will to probate. The specific content of the will must be provided by the testimony of two disinterested witnesses, or, if a correct copy is provided, it shall be proved by one disinterested witness." Not only was Honsberger disqualified from testifying since she was not a "disinterested witness," but the sons did not stipulate to the submission of affidavits in lieu of live testimony from the required disinterested witnesses. An evidentiary hearing was required to be conducted.

MaGill v. Dresner, 35 FLW D1748a (Fla. 3rd DCA 2010).

The ward's three daughters appealed the probate court's appointment of the ward's accountant as guardian and the court's award of attorney's fees to the court-appointed ad litem. The appellate court found that the relatives lacked standing to participate in the guardianship proceedings concerning the award of attorney's fees due to their failure to file a request for notice under 5.060 of the Florida Probate Rules. The court reversed the appointment of the accountant as guardian. The ward had executed a declaration naming preneed guardian wherein she declared that if she were determined incapacitated, she nominated her three daughters to act as co-guardians. The declaration was not filed at the time of the hearing. Based on representation made by the petitioner concerning the declaration, the court concluded that the three daughters were required to act in unison as guardian. One of the daughters was not in agreement as to the proposed living arrangement for the ward. The declaration did not report that the daughters had to act in unanimity. The probate court did not make a factual finding that any one of the daughters was unqualified, unwilling or unable to serve. There was no evidence that the appointment of the daughters as guardian would not be in the ward's best interest. A probate court's appointment of a guardian is reviewed under an abuse of discretion standard. The appellate court reversed, holding that where the ward has designated a preneed guardian in a written declaration, the rebuttable presumption in favor of the designated preneed guardian serving as guardian may only be overcome by substantial, competent evidence.

Graves v. Jusino, 35 FLW D1791c (Fla. 1st DCA 2010).

The trial court entered an order suspending a prior order compelling payment of a claim filed against the estate. The proceeding had not been declared "a specific adversary proceeding," nor had it been declared an adversary proceeding pursuant to rule 5.025(b) or (c) when the order compelling payment was entered. The appellate court reversed, finding that Florida Rule of Civil Procedure 1.540 was not available to the appellees to relieve them from the order. The court also found that neither Florida Probate Rules 5.490 nor 5.496 make provisions for suspension of enforcement of an order compelling payment once entered by the court.

Price v. Austin, 35 FLW D1793a (Fla. 1st DCA 2010).

On June 12, 2008, a notice that the proceedings to determine incapacity were adversarial was served. The court entered an order determining the alleged incapacitated person was totally incapacitated on July 7, 2008. Over one year later, the petitioner served a verified petition to approve payment of fees. In affirming the denial, the appellate court held that once a proceeding is declared adversarial, Florida Rule of Civil Procedure 1.525 requires a motion for attorney's fees to be filed no later than 30 days after the judgment. The court held this is applicable for fees under 733.106(2) and 744.108.

Armstrong v. State, 35 FLW D1801b (Fla. 2nd DCA 2010).

The state court convicted Armstrong of fraudulent use of a credit card and sentenced him to 10 years in prison. The only evidence presented was the testimony of Dana Lewis, who owned the credit card used by Armstrong. During Lewis' testimony the State offered as evidence printouts of her account transactions for the relevant time periods. Lewis had downloaded and printed this evidence of the transactions in her account from her bank's website. Over the defense's timely objection, the State presented these transactions to her for identification and to establish which were unauthorized. The appellate court reversed on the grounds that the State had not produced a records custodian to testify to the authenticity of these records as required by Section 90.803(6)(a), F.S.; nor had the State provided an affidavit to self-authenticate them as permitted by Section 90.902(11), F.S.

Call for papers – *Florida Bar Journal*

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

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

LexisNexis® tips: Online video complements law firms' search marketing strategy

No attorney can expect his or her firm's online video to get 170 million views like Susan Boyle's performance on *Britain's Got Talent*, but there are ways to ensure a law firm's video complements the overall marketing strategy, says Debra Regan, vice president of the internet marketing agency at LexisNexis. Regan offers several suggestions about the importance of online video in helping to grow a lawyer's practice:

1. When considering online video compared to TV advertising, think about the web as a "lean-forward" medium. Visitors searching your site can click away any time they wish. The goal is to immediately engage and keep visitors there beyond a minute. Of the U.S. Internet audience, almost 78 percent have viewed online video, watching 235 minutes on average, says comScore Networks Inc., Video Matrix Service, May 2008.
2. Think in a trio—three key messages delivered in the first 30 seconds of the video. That's the maximum number viewers will remember.
3. Be energetic and passionate about your services and commitment to client service. Video offers an opportunity for lawyers to be personable and approachable. If you make a mistake, chalk it up to a natural error that could be more appealing to potential clients than if you filmed a too-perfect performance. Natural and relaxed is the way to be.
4. If you have a camcorder at home, practice with it. Become comfortable looking into the camera and be sure your eyes are not darting around the room during filming. If no video cam is available, practice speaking into a mirror.
5. Complete the video with an actionable invitation. Visitors should be invited to reach you by phone or email for further information. The end production should be no longer than two minutes, with the first 45 seconds the most critical to engage viewers.
6. Incorporate video on your firm's website and distribute to relevant channels. Upload on social media sites and legal directories, like Lawyers.com℠. Video can increase your exposure on the search engines. Google incorporates video in its universal search results, especially videos from YouTube.
7. When engaging in pay-per-click campaigns, key words drive success. When shooting a video, optimize it with mention of top keywords early and often. e.g., "I am an elder law attorney in Miami, Florida." At the same time, add these key words to the video file name and title "elder law attorney in Miami video."
8. Expect to track and measure pre- and post-publish statistics for your website. Be sure to delineate the web page on which the video is uploaded to measure such statistics as page views, downloads, call tracking with a dedicated number or other metric.
9. Cross-promote your video on other pages of your website. Add linking and sharing functionality so people can forward to a friend, bookmark or post on other sites like Facebook and Twitter. Add your video to YouTube (www.youtube.com) and other video distribution sites to help generate traffic to your own website.
10. Measure, measure, measure! The average viewing time for a LexisNexis-produced law-firm video is 41 seconds according to captured data in October 2008. You'll want to know the number of viewers, the pass-along rate, the percentage of the video that was viewed and whether or not leads are being generated by the video. Other metrics can be added later.

Debra Regan *(*debra.regan@lexisnexis.com*) is vice president of the Internet marketing agency at LexisNexis, part of the Lawyers.com℠ and Martindale-Hubbell networks since 1999. For more than 10 years, LexisNexis has delivered a full suite of online marketing services to lawyers as a trusted brand. The in-house agency is staffed with search marketing, pay-per-click, video and web design experts along with a full team of web developers with key industry certifications. For more information, visit* www.lexisnexis.com/lmc*.*

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The project is designed to index the most current reports from DCF and then work backward through the previous years until the entire database is indexed and searchable. Sample indexes:

Nursing Home Discharge

Needs Cannot Be Met by the Facility

Health Improved; No Longer Needs Service

Facility Ceases to Operate

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Burden of Proof

Excess Assets/Resources

Determining Asset Value

Information Insufficient to Establish Eligibility

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