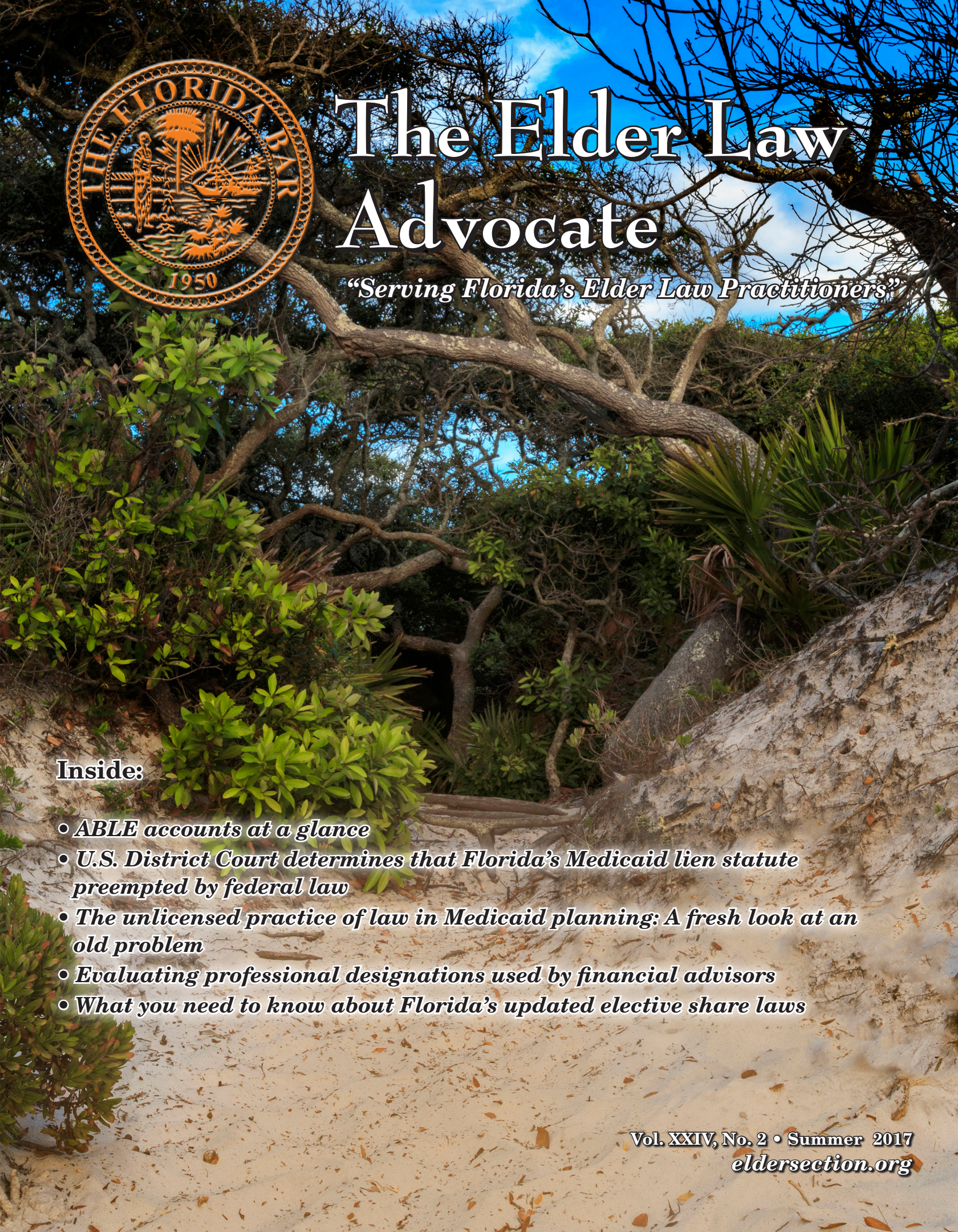


The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Inside:

- *ABLE accounts at a glance*
- *U.S. District Court determines that Florida's Medicaid lien statute preempted by federal law*
- *The unlicensed practice of law in Medicaid planning: A fresh look at an old problem*
- *Evaluating professional designations used by financial advisors*
- *What you need to know about Florida's updated elective share laws*

Vol. XXIV, No. 2 • Summer 2017
eldersection.org

The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar

COVER ART

Grayton Beach State Park, Florida
by Randy Traynor
randytraynorphotography.com

9/2017

Contents:

The deadline for the FALL 2017 EDITION: November 1, 2017. 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 Kristina M. Tilson at *kristinatilson@gmail.com*, or call Chris Hargrett at 850/561-5625 for additional information.

Correction

Stephanie M. Villavicencio, Esq., is a partner with Zamora, Hillman & Villavicencio. We reported otherwise in the spring edition of the Advocate. We regret the error.

Letter to the editor

In the spring 2017 issue of *The Elder Law Advocate*, Horacio Sosa does a fine job in explaining the basics of the POLST (Physician Orders for Life-Sustaining Treatment) concept. However, Mr. Sosa's prediction that POLST legislation would be enacted in Florida in 2017 turned out to be quite inaccurate, with Senate Bill 228 not advancing. Although there is no legal impediment to physicians writing POLSTs for appropriate patients in Florida today,[1] there is no specific legislation yet explicitly authorizing the practice or providing express legal immunity for physicians or other health care professionals for writing or honoring a POLST. Florida Elder Law attorneys and their clients should know that, since 2010, the Center for Innovative Collaboration in Medicine and Law at Florida State University has acted as the coordinating body for statewide POLST-related efforts in Florida and its website, *http://med.fsu.edu/medlaw/polst,* contains a wealth of relevant information on this subject.

Marshall B. Kapp, JD, MPH
Director, Center for Innovative Collaboration in Medicine and Law
Florida State University

[1] Marshall B. Kapp, *Overcoming Legal Impediments to Physician Orders for Life-Sustaining Treatment*, 18(9) AMA Journal of Ethics 861 (2016), available at *http://journalofethics.ama-assn.org/2016/09/toc-1609.html.*

A privilege to serve

It is such a great privilege to have the opportunity to serve as chair of the Elder Law Section of The Florida Bar. I consider this enormous responsibility as the pinnacle of my service to our section, and I am committed to doing my best to follow in the extremely large footsteps of those who have served before me in this position.

My main goals during my year of service are as follows:

Continue to track proposed and existing legislation that impact the elderly, the disabled and elder law practitioners with the aim of being more proactive than reactive. We have an active and engaged legislative committee co-chaired by William Johnson and Shannon Miller. Our section now has our own lobbyist, Brian Jogerst, who we work with very closely on issues affecting our practice areas.

Increase the diversity and size of the section membership by actively recruiting elder law attorneys who are not yet members. We are also recruiting law students and professional guardians to join our section as affiliate members. Last year I was humbled to be appointed to The Florida Bar's Diversity and Inclusion Committee. The mission of that committee is to increase diversity and inclusion in The Florida Bar so that the Bar will reflect the demographic of the state, to develop opportunities for community involvement, to make leadership roles within the profession and to make the Bar accessible to all attorneys, including those who are racially, ethnically and culturally diverse, women, members of the LGBT community and persons with disabilities. I would like to apply this principle to the Elder Law Section.

Increase our section's use of technology, including offering more web-based seminars and actively using our social media accounts, which link back to our webpage. We have worked hard on revamping our section's website. Please take a look at *elderlawsection.org* and be sure to provide us with your feedback. Also, please visit and join our social media pages, Facebook: *https://www.facebook.com/FloridaBarElderLawSection/ and Twitter: @FlaElderlawSec.*

Public relations building to improve the image of the section, using the media to spotlight volunteer and pro bono events in which our members engage. We will work with our lobbyist to reach out to our legislators and community leaders regarding the practice of elder law in order to build a greater awareness of who we are, what we do and how we assist our clients.

Collett P. Small

Message from the chair

Encourage our members to participate in The Florida Bar's leadership track. As a section, we plan on actively supporting and encouraging Elder Law Section members to apply to The Florida Bar Leadership Academy and other opportunities for leadership within The Florida Bar.

Our section is a section of rock stars, too many to mention in one article. It is an exhilarating yet sobering experience to be the chair of a section with so many talented, accomplished and zealous members. I would like to use this forum to spotlight a few of our superstars. In June, our section awarded Twyla Sketchley with the Charlotte Brayer Award for Outstanding Public Service. This is Twyla's second time taking home this prestigious award, which she won previously in 2009. Talk about consistency! Our Member of the Year is Shannon Miller, who among other things worked tirelessly in advocating against the electronic will bill, which was eventually vetoed by Governor Scott. Please join me in congratulating our newest board certified elder law attorneys, Tommy G. Smith of Pensacola, Lawrence Levy of Davie and Carolyn B. Norton of Vero Beach. With these three new additions, we are currently at 108 board certified elder law attorneys!

One of my first acts as chair was to reach out to chairs of other Florida Bar sections with the objective of having our respective sections serve as a resource for each other in the areas of law where our practices differ and to collaborate and foster interactions on issues of importance in practice areas where we overlap. The response from the other sections has been very favorable. I look forward to developing these relationships.

Retreat: Each year the section chair gets to select where the section will have its retreat. This year I took advantage of that opportunity to have our first out-of-the-country retreat in my homeland of Jamaica. The retreat will be at the beautiful Half Moon Resort in Montego Bay. While in Jamaica we will visit the Jamaican Supreme Court and meet with the Honorable Justice Zaila Rowena McCalla, OJ, chief justice. Also on our agenda is lunch at Usain Bolt's Track and Records restaurant in Kingston. We will be climbing the Dunn's River falls and exploring Ocho Rios, and yes, CLE credits will be awarded!

On our horizon is the section's flagship event, our Essentials and Annual Update CLE, which will be held January 11-13, 2018, at Portofino Resort in Orlando. Jason Waddell is the program chair for this event. He, Sam Boone and Marjorie Wolasky, co-chairs of the CLE committee, have been working hard to select speakers and topics to ensure that this will be another successful event. Room reservations are already open for this event. Please check out our website for further information.

In the words of Helen Keller, "Alone we can do so little, together we can do so much." Please do not hesitate to reach out to me with any suggestions regarding how we can make our section better for you and our members.

Medicaid programs other than ICP and LTC waiver

by Heidi M. Brown

Many people do not realize that Florida has many different Medicaid programs. In fact, there are Medicaid programs, other than the ICP (aka nursing home Medicaid), SMMC-LTC (LTC waiver) and hospice that will be of interest to elderly clients, such as:

Medicaid for Aged and Disabled (MEDS-AD or Community Medicaid)

This program pays for medical assistance for doctors, hospitals, prescriptions, physical therapy, occupational therapy and short-term stays in a rehab facility.

- Requirements: Single individuals can only have $874 per month in gross income and $5,000 in countable assets. Married couples can only have $1,178 per month in gross income and $6,000 in countable assets. If the individual needs long-term care in a rehabilitative facility or skilled nursing facility (SNF), then the individual must meet the requirements of ICP.

Medicare Savings programs

- Qualified Medicare Beneficiary (QMB) – will pay for an individual's Medicare Part A and Part B premiums, Medicare deductibles and Medicare co-insurance.
  - » Requirements: Single individuals can only have $992 per month in gross income and $7,280 in countable assets. Married couples can only have $1,339 per month in gross income and $10,930 in countable assets.
- Qualifying Individuals 1 (QI 1) – will pay for an individual's Medicare Part B premiums.
  - » Requirements: Single individuals can only have $1,341 per month in gross income and $7,280 in countable assets. Married couples can only have $1,808 per month in gross income and $10,930 in countable assets.
- Special Low-Income Medicare Beneficiary (SLMB) – pays for an individual's Medicare Part B premiums.
  - » Requirements: Single individuals can only have $1,191 per month in gross income and $7,280 in countable assets. Married couples can only have $1,606 per month in gross income and $10,930 in countable assets.
- Extra Help aka Low-Income Subsidy – pays for an individual's Medicare Part D (prescription drug plan) premium and the annual deductible. It also pays for prescription coverage during the "doughnut hole" gap period. The individual's co-pays are $3.30 for generic drugs and $8.25 for brand-name drugs.
  - » Requirements: Single individuals can only have yearly income of $17,820 and $13,640 in countable assets. Married couples can only have yearly income of $24,030 and $27,250 in countable assets. The individual must already be enrolled in Medicare A and Medicare B.
  - » Note: Individuals who are eligible for QMB, QI 1, SLMB, ICP and Home and Community Based Service (HCBS) waivers are automatically eligible for Extra Help Medicare Part D plans.
  - » Qualified Disabled and Working Individuals (QDWI) program – pays for Medicare Part A premiums for people under age 65 who lost their premium-free Medicare Part A when they returned to work.
- Requirements: Single individuals can only have $1,985 in gross monthly income and $4,000 in countable assets. Married couples can only have $2,678 in gross monthly income and $6,000 in countable assets.

Medically Needy aka Share of Cost program

This program is for individuals whose income is too high to qualify for other Medicaid programs, but who have high medical bills. Each month the individual has a share of cost, similar to a deductible, that must be met before Medicaid will cover the medical bills. Each month, the share of cost resets and the individual must start over again. After the share of cost is met, the individual is entitled to full community Medicaid benefits for that month only. The share of cost is equal to the individual's gross income minus $180 per month and minus $20 per month of a general income disregard. So, if the individual's gross income is $1,200 per month, then the share of cost is $1,020 per month. The individual must pay $1,020 per month in medical expenses before Medicaid will start paying. Or another way to view it is that the individual is only allowed $200 per month to pay non-medical bills.

- Requirements: Single individuals can only have $5,000 in countable assets. Married couples can only have $6,000 in countable assets.
- To meet the share of cost, the individual can submit:
  - » Unpaid medical bills;
  - » Medical bills paid within the last three months by the individual;

continued, next page

Medicaid programs ...
from page 5

- » Health insurance premiums;
- » Co-pays for medical bills;
- » Medical services, if prescribed by a doctor; and
- » Transportation for medical care.

- The individual cannot use the following to meet the share of cost:
  - » Premiums for insurance policies that pay money to the individual for hospitalization (e.g., AFLAC); and
  - » OTC medical supplies, such as bandages, cough syrup, aspirin.

Program of All-Inclusive Care for the Elderly (PACE)

This program provides home and community-based services and medical care for individuals who are in need of nursing facility care. The program will meet the individual's medical needs and long-term care needs. PACE provides and pays for doctor's visits; hospital stays; case management; supplies such as incontinence pads; prescriptions; medical care; caregiver support; in-home health aides; and physical, occupational and speech therapies. PACE will also pay for skilled rehabilitation, respite care, nursing homes and assisted living facilities. PACE offers adult day care and activities in the PACE facility. In addition, PACE provides transportation to and from its facility. Unfortunately, PACE is only in certain counties, i.e., Charlotte, Collier, Lee, Miami-Dade, Palm Beach and Pinellas.

- Requirements: The individual must be at least 55 years or older and disabled or 65 years or older. The individual must select the PACE provider to be the Medicare and Medicaid provider. Thus, the individual must see the PACE physicians. The financial requirements are similar to the ICP and HCBS waiver programs. The single individual can only have countable assets of $2,000 and $2,205 in gross monthly income. For a married couple, the applicant can only have $2,000 in countable assets and the community spouse can only have $120,900 in countable assets. There is no limit to the gross monthly income for the community spouse. If both spouses are on PACE, they can only have $3,000 in countable assets.

So, the next time you counsel a client who is not yet ready for either a nursing home or an assisted living facility, double check to see if he or she might be eligible for and interested in one of these lesser-known Medicaid programs.

***Heidi M. Brown, Esq.**, a board certified elder law attorney, is an associate with Osterhout & McKinney PA in Fort Myers, Fla. She is co-chair of the ELS Medicaid Committee. Her practice includes Medicaid planning, VA planning, estate planning, probate and trust administration. She received her law degree from the College of William and Mary Law School in Williamsburg, Va., and her undergraduate degree from Georgetown University in Washington, D.C.*

ABLE accounts at a glance

by David Lillesand

1. What is ABLE?

ABLE is an IRS tax-favored, public benefits safe-harbor bank or investment account, approved by Florida statutes, allowing certain disabled individuals to begin to receive or to continue to receive means-tested federal benefits such as SSI, Medicaid, food stamps, Section 8 housing and other federally funded programs. The account exists only online and is managed directly by the person with disabilities or his or her legal guardian or other appointed individual. The amount in the ABLE account does not affect SSI until there is more than $100,000 in the account, and Florida Medicaid is protected for amounts in the ABLE account up to $418,000. The total additions to the person's ABLE account are limited to $14,000 from all sources, not $14,000 from each source. Special needs trusts may fund ABLE accounts, giving disabled individuals more control over their personal funds and lifestyle. Most importantly, use of an ABLE account avoids the in-kind support and maintenance deduction for food and shelter expenses, which can boost the SSI check from $490 per month to the full $735 per month, thus putting an additional $3,000 in the direct control of the person with disabilities while maintaining his or her benefits.

a. Federal statutes – Achieving a Better Life Experience Act of 2014, P.L. 113-295, enacted as part of the Tax Increase Prevention Act of 2014, in Division B, Title I, Dec. 19, 2014.
   i. Without affecting federal means-tested benefits, allows annual deposits of gift tax exclusion amount under IRC § 2504(b) (currently $14,000) and accumulations to $100,000 for SSI (ABLE Act § 103) and for Medicaid to the state's limit for aggregate contributions under its Qualified State Tuition program per IRC § 529(b)(6) (currently $418,000 for individuals in Florida).
   ii. Purpose and original intent – Allows individuals with disabilities a means to save and accumulate money in a tax-favored manner. ABLE Act § 101(1); 26 USC 529A.
   iii. Savings and distributions will "supplement, but not supplant," federal benefit programs including SSI, Medicaid and other [federal] sources. ABLE Act § 101(2), Purposes.
   iv. Creates a statutory list of "qualified disability expenses," which include education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses and other expenses approved by the secretary through regulations. IRC § 529A(3)(5). Qualified disability expenses also include by regulation "basic living expenses." IRS Regulations § 1.529A-1(16); POMS SI 01130.740.B.5.
   v. Unintended consequences.
      1. Impact on SSI income rules.
         (a) ABLE permits payment of food and shelter, thus creating an easy method to avoid the ISM on an ongoing basis, which becomes a significant pass-through for SNT administrators and ongoing family contributors (QDEs include "housing" and "basic living expenses"). "Do not count distributions from an ABLE account as income of the designated beneficiary, regardless of whether the distributions are for non-housing QDEs, housing QDEs or non-qualified expenses." POMS SI 01130.740.C.4.
         (b) Funds in ABLE account are directly in control of individual, thus easing the pain of SNT administrators and the inconvenience of the clients.
         (c) ABLE accounts increase by one-third the amount of SSI monthly check (from $488 to $733), for $3,000 additional annual tax-free income.
      2. Impact on SSI resource rules – Even above the presupposed $14,000 limitation, § 529A accounts create an alternative to special needs trusts for even very large structured personal injury awards, as the examples below demonstrate.

b. Internal Revenue Service code section, regulations and notices.
   i. Creates new IRC section, 26 USC § 529A.
      1. State(s) allowed to create a qualified ABLE program administered by the state or an agency of the state government. IRC § 529A(b).
      2. Contributions subject to annual limit and cumulative limits. ABLE Act § 102(a)(2)(B)

continued, next page

and § 103(a) [limit to $100,000 for SSI eligibility], and (b) [Medicaid not affected by SSI $100,000 limit].

3. Contributions must be made in cash, or equivalent. IRC § 529A(b)(2).
4. When made by person other than designated beneficiary, contributions are nontaxable gifts. ABLE Act § 102(20(A); IRC § 529A(c)(2).
5. Distributions from the account are not included in beneficiary's gross income. ABLE Act § 102(c)((1)(B)(i); IRC § 529A(c)(1)(B).
6. "An ABLE account may be used for long-term benefit and/or short-term needs." IRS Guidance under Section 529A, ¶ Background, June 22, 2015.
7. ABLE account's "balance, contributions to the account and distributions from account" are disregarded for eligibility for means-tested federal programs. ABLE Act § 103.

ii. Proposed IRS Regulations on "Qualified ABLE Programs," 26 CFR § 1.529A-0 through § 1.529A-7.

1. "Until the issuance of final regulations, taxpayers and qualified ABLE programs may rely on these proposed regulations." Federal Register publication of proposed rules, "Guidance under Section 529A: Qualified ABLE Programs," June 22, 2015.
2. "Qualified Disability Expenses" should "be broadly construed to permit inclusion of basic living expenses" and "should not be limited to expenses for items for which there is a medical necessity or which provide no benefits to others in addition to the benefit to the eligible individual" (rejects the SSA sole benefit rule).
3. Rollover of 529 higher education account to a 529A account is (not yet) permitted.

iii. IRS "Notice" – Notice 2015-18, 2015-12 IRB 765 (Mar. 23, 2015) clarifications.

1. The owner of the ABLE account is the designated (disabled) beneficiary.
2. The signatory on the account, if not the beneficiary, may neither have nor acquire any beneficial interest in the account, and must administer for the benefit of the designated beneficiary.
3. ABLE state legislation, ABLE accounts and documents issued before final IRS regulations that do not fully comport with the final IRS regulations will have transition relief by the IRS to bring them into compliance.

c. Florida statutory implementation.

i. Implementing state statute is Florida Statutes § 1009.986, the "Florida ABLE Program."

ii. Nominated Florida state agency is the Florida Prepaid College Board, which established Florida ABLE, Inc., a direct-support organization, which brands the "ABLE United" program under Executive Director John Finch, who reports to the Florida Prepaid College Board Deputy Director Will Thompson. F.S. § 1009.986(3).

iii. The Florida ABLE program had to be established on or before July 1, 2016, and create a "participation agreement" for designated beneficiaries of this state. Florida ABLE, Inc., will establish a comprehensive investment plan with products offered to participants.

iv. Moneys paid into or out of the fund are specifically exempt from the claims of creditors. F.S. § 1009.986(6); F.S. § 222.22(5).

v. Upon the death of the beneficiary, Medicaid may file claims, but funds in the ABLE account of the deceased designated beneficiary must first be distributed for qualified disability expenses, which include unpaid bills and funeral and burial costs, before distributions to repay Medicaid. F.S. § 1009.986(7).

2. New Social Security POMS on ABLE accounts – SI 01130.740, effective Mar. 21, 2016.

a. Exempts contributions as "countable income" of the SSI claimant as well as accumulated assets as their "countable resources."

b. Who can contribute – A "person," which is broadly defined by the IRC § 7701(a)(1) as "an individual, trust, estate, partnership, association, company, or corporation." In accord, POMS SI 01130.740.B.2. Per federal legislative history, a "person" includes the designated beneficiary. 160 Cong. Rec. H7051, H8317, H8318, H8321, H8322 (2014).

c. Who can be the designated beneficiary POMS SI 01130.740.B.1.

i. Title XVI SSI recipient with disability payments that began before age 26.

ii. Title II SSDI, DAC/CDB, DWB recipient with disability payments before age 26.

iii. Someone who has certified, or whose parent or guardian has certified, that he or she:

1. Has a medically determinable impairment meeting certain statutorily specified criteria; or
2. Is blind; and
3. A disability or blindness, "which condition was present" before age 26, which is a much different standard than the harsher "onset of disability" under the SSA rules. See SSR 83-20: Titles II and XVI: Onset of Disability.

iv. Individuals over age 26 who were in payment status prior to age 26, or who were not but can prove that the condition was present prior to age 26. For example, the author assisted a 68-year-old developmentally disabled adult and his guardian to place his unplanned $10,000 inheritance in a qualifying ABLE account. The individual does not have to be under age 65 to qualify for ABLE.

d. Who owns the account – The "designated beneficiary," i.e., the disabled individual.

e. Who can withdraw from the account – "The person with signature authority," which can be the disabled individual, or "if incapable," parents of minor child, legal guardian or an agent with POA.

f. What can they withdraw for – "Qualified Disability Expenses" (QDE).

i. "A QDE includes, but is not limited to, the following: Education, housing, transportation, employment training and support, assistive technology and related services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for ABLE account oversight and monitoring, funeral and burial, and basic living expenses, and anything added by Secretary of the Treasury." POMS SI 01130.740.B.5.

ii. Most significant – SSA defines "housing" using POMS SI 00835.465 standard and includes mortgage (including property insurance required by the mortgage holder), real property taxes, rent, heating fuel, gas, electricity, water, sewer or garbage removal. POMS SI 10030.740.B.8.

iii. "Food" is not included in housing, but is included as a QDE "basic living expense" per IRS rules, specifically including under IRS rules food purchased in grocery stores, fast food or other restaurants and home delivery (pizza, Chinese, etc.).

iv. Further definition of these 12 categorical QDEs is not found in either the IRS regulations or the SSA POMS, and like the "sole benefit rules for SNTs" and the "for the benefit of rules" for ABLE, will be a judgment call by the designated beneficiary unless Florida's ABLE United issues administrative regulations. Currently the enabling Florida statute simply states that a "'qualified disability expense' has the same meaning as provided in s. 529A of the Internal Revenue Code." F.S. § 1009.986(2)(i).

3. Six similarities between SNTs and ABLE accounts.

a. Both are statutorily created safe harbors.

b. Both increase eligibility for SSI and Medicaid, and retention of cash over the $2,000 resource limit.

c. No SSI income deduction for third-party contributions; SSI claimants contribute after-counted income, but income in month received does not became a resource if placed in an ABLE account before the first of the month.

d. No necessity to secure prior government approval to make a distribution.

e. Medicaid payback applies to both, but Medicaid repayment terms are better under ABLE accounts.

f. Means-tested federally funded agency rules already have been or will have to be amended. New SSI POMS already published; Medicaid, Section 8, food stamps and others will follow.

4. 15 differences between SNT and ABLE.

a. Control of and direct access to funds in the account.

i. SNT – Funds in hands of trustee who stands between disabled client and his or her money.

ii. ABLE – The disabled person or "person with signatory authority" (legal guardian, parent of minor child, POA agent) has direct access to ABLE funds with no third-party permission required to spend money from the ABLE account.

b. "Sole benefit rule" changed.

i. SNT – POMS SI 01120.203.B.1.e: "Under the special needs trust exception, the trust must be established for and used for the benefit of the disabled individual. SSA has interpreted this provision to require that the trust be for the sole benefit of the individual, as described in SI 01120.201F.2."

ii. ABLE – IRS proposed regulations: "QDEs should not be limited to expenses for items for which there is a medical necessity or which provide no benefits to others in addition to the benefit to the eligible individual." The ABLE POMS at SI 01130.740.B.2: "Distributions are only to or for the benefit of the designated

continued, next page

beneficiary." SSA's definition of "for the benefit of" is found in POMS SI 01120.201.F.1: "Consider a trust established for the benefit of an individual if payments of any sort from the corpus or income of the trust are paid to another person or entity so that the individual derives some benefit from the payment. Likewise, consider payments to be made on behalf of, or to or for the benefit of an individual, if payments of any sort from the corpus or income of the trust are paid to another person or entity so that the individual derives some benefit from the payment."

c. Reduces the Medicaid lien to be recaptured.
   i. SNT – Repay "all states for all time"—medical assistance from birth to death, including prior to creation of SNT. "Medicaid payback may also not be limited to any particular period of time, i.e. payback cannot be limited to the period after establishment of the trust." POMS SI 1120.203.B.1.h.
   ii. ABLE – Repay medical assistance only "after the establishment of ABLE account." ABLE Act § 102(f).

d. Payments allowed after death and before the Medicaid lien.
   i. SNT – Immediately stop all payments except those categories specifically allowed by POMS in SI 01120.203.B.3.
   ii. ABLE – Pay all outstanding QDEs first before the Medicaid lien. POMS SI 01130.740.A: "… funds remaining after payment of any outstanding, qualified disability expenses … ." ABLE Act § 102(f): "Subject to any outstanding payments due for qualified disability expenses, upon the death … ."

e. Funeral and burial expenses.
   i. SNT – Not permitted from SNT funds until Medicaid is paid. POMS SI 01120.203.B.3.b.
   ii. ABLE – Funeral and burial expenses are specifically permitted QDEs from the ABLE account, and outstanding QDEs may be paid after death but before the Medicaid repayment. POMS SI 01130.740.B.5; ABLE Act § 102(f).

f. Age 65 limit removed.
   i. SNT – No, SSI is lost; and Medicaid is lost in most states, but not in Florida but only for pooled SNTs. POMS SI 01120.203.B.1.b.
   ii. ABLE – Yes, may fund after age 65 because there is no upper age limit in definition of "designated beneficiary." POMS SI 10030.740.B.1; ABLE Act § 102(e)(1).

g. Impact on other federal benefit programs such as food stamps, Section 8 and others.
   i. SNT – SNT federal statute SSI and Medicaid statutes only protect two programs, SSI and Medicaid.
   ii. ABLE – Protects all 11 means-tested federal programs, including food stamps, Section 8, community Medicaid and LTSS/HCBS Medicaid and nine other federal means-tested programs. ABLE Act § 103.

h. Special needs planning practice.
   i. SNT – Yes. Special needs planning attorney needed to draft d4A SNT or d4C joinder agreement and the notice to SSA and/or Medicaid.
   ii. ABLE – No. Client and family can do directly, no participation by attorney in drafting documents required.

i. Fewer SSI denials and appeals to determine validity of "safe harbor" of the account.
   i. SNT – Each and every SNT is reviewed by SSA regional SNT review teams that sometimes deny perfectly good SNTs. POMS SI 01120.202.A.1.a.
   ii. ABLE – Once established by the state government and approved by SSA as a safe harbor, no individual SSA approval will be required as to the validity of the program.

j. Cost of setup and ongoing management of account.
   i. SNT – Setup fees range from $500 to $1,500, and yearly fees range from 1.25 percent to 3.15 percent of amount in the trust.
   ii. ABLE – $60 setup fee and $60 per year management fee.

k. State interference with the purpose of the federal program.
   i. SNT – Yes, some states impose state conditions on SNT creation and use (e.g., N.J.).
   ii. ABLE – Specifically not permitted in means-tested programs if any federal funds are involved, such as food stamps, Section 8, etc. ABLE Act § 103.

l. Ease of opening a safe-harbor account by legal guardian.
   i. SNT – Court-appointed guardian must secure a specific court order, which costs attorney's fees and the guardian's time. F.S. § 744.441(19) Powers of guardian upon court approval.
   ii. ABLE – Court-appointed guardian may open account without court order, saving time and

fees. F.S. § 744.444 (10) Powers of guardian without court approval.

m. Number of SNT or ABLE safe-harbor accounts.
   i. SNT – An individual may, and often should, have multiple SNTs.
   ii. ABLE – An individual may have only one ABLE account, ABLE Act § 102(b)(1)(A); 26 USC § 529A(c)(4); IRS regulations § 1.529A-2(a)(3).

n. Method of determining "disability."
   i. SNT – Adults must meet the restrictive SSA adult five-step sequential evaluation process.
   ii. ABLE – Under the "disability certification" rules, the IRS regulations use the more lenient and easier to prove SSA child disability standard of "marked and severe functional limitations in domains" even for adult-designated beneficiaries. IRS regulations § 1.529A-2(e)((1)(A) and defined in IRS regulations § 1.529A-2(e)((2).

o. Protection from creditor claims.
   i. SNT – Although an SNT must contain a spendthrift clause per POMS SI 01120.200 for first-party SNTs, Florida is not an asset-protection trust state, and the funds in an SNT are not safe from creditors.
   ii. ABLE – Pursuant to Florida statutes, funds in or paid out of the ABLE account are "not liable to attachment, levy, garnishment, or legal process." F.S. §§ 1009.986(6) and 222.22(5). In addition, ABLE accounts are exempt assets in federal bankruptcies. ABLE Act § 104.

5. Limits and work-arounds on use of ABLE accounts.

a. Statutory financial limits.
   i. Yearly contribution(s) limit is $14,000 per year, currently.
      1. Small, one-time inheritance/PI award, but up to $28,000 if split at end of year over the two calendar years.
      2. Even huge awards – e.g., $500,000 person injury award can use ABLE account via a "down-stroke" of $200,000 for house, car, other immediate spend-down needs, keep $16,000 cash in $2,000 checking account and $14,000 in an ABLE account, with future annual structured settlement payments of $14,000 per year or $1,166 monthly into disabled plaintiff's ABLE account.
      3. Ongoing church/community assistance fundraisers and charitable contributions.
   ii. Accumulation limits.
      1. SSI – $100,000 ABLE plus $2,000 resource limit – will not occur until 2023 at earliest at maximum rate of $14,000 per year if no money ever spent from the ABLE account.
      2. Medicaid limit – In Florida, up to $418,000 before loss of eligibility.

b. Statutory "disability onset" issues and work-arounds.
   i. For disability benefits that began prior to age 26 (an arbitrary number, with current bill in Congress to increase to age 46) and continue to present – onset is established.
   ii. For disability benefits that first began after age 26 – client has to allege and possibly prove "onset" versus "condition present before age 26."
      1. Difference between when SSI/SSDI payments began and the traditional legal definition of "onset" in the current SSA rules versus ABLE statutory language, which in IRS regulations § 1.529A-2(e)((3) requires only that "the condition was present" before age 26.
      2. IRS proposed regulations draft list of SSA compassionate allowance conditions, see *ssa.gov/compassionateallowances/conditions.htm*.
      3. Processing the SSI disability claim in SSA ALJ hearings.
         (a) Onset not an issue at initial award if application filed after age 26 – retroactive award by law can be paid only back to date of onset.
         (b) How to raise issue of onset if benefits payments began after age 26 – use a disability certificate under IRS regulations § 1.529A-2(e)(1).

6. How to use ABLE effectively in special needs planning.

a. ABLE account alone (see examples in ¶10 below) and use for:
   i. Small inheritance.
   ii. Small PI award.
   iii. Large PI award using structured settlement payments at $14,000 annual limit.
   iv. Church/other charitable fundraisers.
   v. Child support.
   vi. Alimony.

b. ABLE in conjunction with other special needs planning – spend-down, PSKs, prepayment of food and shelter, etc.

continued, next page

i. Reduce administrative costs of SNTs by reducing the amount that has to go into the SNT where trustee charges a fee based on assets under management, by establishing the maximum ABLE amount.

ii. Increase SSI check from $488/mo., because of ISM reduction, to full FBR $733 (2016), resulting in an increase of nearly $3,000 per year of SSI tax-free benefits by using ABLE account.

7. Drafting suggestions for first- and third-party SNTs.

a. None needed to open ABLE account – can be opened directly by individual and others.

b. Modifying your current first- and third-party SNT documents.

i. Language in first-party SNTs: choose one depending on client's wishes and appropriateness.

1. Mandating $14,000 total per year contributions or maximum amount allowed under 26 USC § 529(b)(6), or

2. Permitting trustee to fund up to the maximum contribution per year.

ii. Language for third-party SNTs.

1. ABLE rarely to be used as accumulation/investment trust because of ABLE Medicaid lien, whereas there is no Medicaid lien on third-party SNTs. POMS SI 01120.202.A.1.

2. Mandate SNT trustee to contribute maximum contribution to ABLE account to avoid or reduce the SSI ISM reduction from disabled client's SSI check, or

3. Permit the trustee to consider annual ABLE re-funding of up to the maximum contribution (currently $14,000 per year), depending on who will be accessing the ABLE funds and this party's financial competency.

a. Use SSI claimant's direct access when there is a:

i. Perfectly competent but disabled designated beneficiary;

ii. Legal guardian; or

iii. Agent under POA.

b. Question whether to allow direct access when there is a:

i. Spendthrift;

ii. Person addicted to drugs or alcohol; or

iii. Undeclared but incapacitated individual who has no POA and is not but should be under a guardianship.

8. Mechanics of Florida's ABLE United program.

a. Establishing an account – ABLE United must file IRS Form 5498-QA, ABLE Account Distribution Information—earnings from ABLE account investments are tax free.

b. Reporting distributions – ABLE United must file distributions report on IRS Form 1099-QA, Distributions from ABLE Accounts—distributions for QDEs are tax free.

c. ABLE account fees – Startup costs and ongoing management fees are each approximately $60 per year, but could be less. Final announcements of the exact costs were not available at time of preparation of this outline.

9. ABLE account's lack of adverse effect on other federal programs.

a. Supplement, but not supplant – The Act seeks to provide secure funding that will "supplement, but not supplant, benefits provided through private insurance, the Medicaid program, the SSI program, the beneficiary's employment, and other sources." ABLE Act § 101(2).

b. ABLE accounts safe from both income and asset rules. The Act states "notwithstanding any other provision of Federal law that requires consideration of one or more financial circumstances of an individual, for the purpose of determining eligibility to receive, or the amount of, any assistance or benefit authorized by such provision to be provided to or for the benefit of such individual, any amount in the ABLE account …" protects disabled person's eligibility for food stamps, Section 8 and nine other federal programs. ABLE Act § 103(a).

c. Bankruptcy exemption. ABLE accounts are exempt in bankruptcy proceedings. ABLE Act § 104.

10. Seven examples of using ABLE accounts without an SNT.

a. Small, one-time inheritance or PI award, or the remainder after spend-down plan, possibly split over two calendar years, yielding a deposit of $28,000 into ABLE account.

b. $500,000 net personal injury award – $200,000 used for house, car and other spend-down needs, keep $16,000 in cash (ABLE's Year 1 $14,000 plus $2,000 in checking), with future payments totaling $284,000 paid via tax-free structured settlement monthly payments of $1,166 into plaintiff's ABLE account from Year 2 forward.

c. Fundraisers from church, community and other charitable contributions.

continued, page 48

New HUD standards protect disabled veterans with criminal records against discrimination

by Roberto Cruz

Veterans come to my practice looking for life planning and housing solutions that will not bankrupt their families or themselves. Homeless veterans, in particular, mostly seek my advice on criminal records expungement.[1] Regrettably, psychological wounds make veterans more susceptible to engaging in antisocial behavior.[2] Often a criminal history prevents wounded warriors from obtaining housing and employment.[3] Public and private housing providers will deny an otherwise eligible veteran a placement based on a prior charge of nonviolent crime or a drug- or alcohol-related arrest or conviction.[4] In Florida, veterans are eligible for voluntary admission into a pretrial veterans treatment intervention program if there is evidence of military service-related mental illness, traumatic brain injury, substance abuse disorder or psychological problem.[5] Nonetheless, veterans court does not wipe out a criminal record automatically.[6] Veterans still need to invest time and money to expunge their records.[7] New housing discrimination standards, however, may prove an effective way to prevent homelessness among veterans.

On Apr. 4, 2016, the U.S. Department of Housing and Urban Development (HUD) Office of General Counsel released the *Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions.*[8] HUD advices that an adverse action by a housing provider based on an individual's criminal history may also be held as discrimination based on race, color, religion, sex, disability, familial status or national origin. Adverse action may take the form of overt discrimination and disparate impact or treatment.

Overt discrimination exists when a housing provider openly and blatantly discriminates on a prohibited basis. In practice, a landlord cannot deny rental applications or renewals based on a veteran's race, nationality or disability.

Disparate impact is more intricate because it prohibits neutral policies or practices from having discriminatory effects. HUD guidance states: "A housing provider that imposes a blanket prohibition on any person with any conviction record—no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then—will be unable to meet this burden." To prevent liability, HUD recommends that landlords not use arrest records as a basis for excluding applicants, since an arrest does not necessarily lead to a conviction or prove that an individual engaged in illegal activity. To sum up, a housing provider cannot seek to protect the health and safety of occupants or the integrity of the property by denying housing to veterans with criminal histories.

Disparate treatment is the most common and elaborate form of discrimination. Landlord's liability occurs when a tenant is treated differently based on one of the prohibited bases. The new guidelines instruct landlords screening for criminal history to adopt narrowly tailored policies serving a "substantial, legitimate, nondiscriminatory interest." A landlord must also show that its "tailored" use of criminal background checks *"accurately distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not."* The housing provider must account for the nature, severity and age of a conviction. Landlords are also encouraged to perform an "individualized assessment" considering: 1) the facts or circumstances surrounding the individual's criminal conduct; 2) the individual's age at the time of the conduct; 3) the individual's good tenant history before and after the conviction or conduct; and 4) the individual's rehabilitation efforts. To illustrate this principle, a housing provider cannot reject a veteran with a two-year-old record of nonviolent crime as sole grounds or pretext for denying access on the basis of race, nationality or disability. Moreover, veterans can show participation in either treatment court or rehabilitative care during an individualized assessment.

To exercise their fair housing rights, veterans have several redress options outside the courtroom. One option is the informal hearing. Public housing authorities and federally assisted housing owners must provide veterans with notice and opportunity to dispute the accuracy or relevance of a criminal record before denying housing on the basis of the history.[9] The informal hearing benefits homeless and disabled veterans with criminal records by giving them the opportunity to access federally funded public and subsidized housing; small group homes; independent living projects; and units in multifamily housing developments, condominiums and cooperative housing.[10] Another option

continued, next page

New HUD standards ...
from page 13

is the HUD fair housing complaint process.[11] Veterans can file a HUD Form 903 against a public or a private housing provider. The agency will investigate and conciliate. If reasonable cause for discrimination is found, HUD will charge and prosecute the case. An "aggrieved party" is represented by a government's lawyer before an administrative law judge (ALJ) or in federal court, but the complainant/plaintiff is HUD. The veteran's private attorney partakes in the process by representing the client's interests. Counsel's role is important because the veteran will be investigated and consulted through any settlement negotiations. To conclude, veterans with criminal records have options to avoid homelessness by using the new HUD antidiscrimination standards and by asserting their fair housing rights.

***Roberto Cruz, Esq.**, is the managing attorney of the Life Care Planning Law Firm PLLC, an elder and special needs law practice in Orlando, Fla., and San Juan, Puerto Rico. During his 18 years in the legal profession, he is better known as the former advocacy director and CEO of the Legal Advocacy Center of Central Florida, Inc. (LACCF). His practice is concentrated in life planning, care coordination, elder and special needs law, special education and civil rights. For more information, please visit lifecareplanning.lawyer.*

Endnotes

1 Jamison Fargo, Stephen Metraux, Thomas Byrne, Ellen Munley, Ann Elizabeth Montgomery, Harlan Jones, George Sheldon, Vincent Kane, and Dennis Culhane, *Prevalence and risk of homelessness among US veterans,* 9 Prev Chronic Dis 110 (2012).

2 *See generally* Mental Health, U.S. Dep't of Veterans Affs., http://www.publichealth.va.gov/epidemiology/publications.asp (last updated 2015); Judge Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 564 (2010).

3 Sara Kintzle, Mary Keeling, Elizabeth Xintarianos, Kamil Taylor-Diggs, Chris Munch, Anthony M. Hassan, and Carl A. Castro, *EXPLORING THE ECONOMIC & EMPLOYMENT CHALLENGES FACING U.S. VETERANS: A Qualitative Study of Volunteers of America Service Providers & Veteran Clients,* USC School of Social Work, Center for Innovation and Research on Veterans & Military Families (May 2015).

4 *See id.*

5 Hon. C. Philip Nichols, Jr., *Veterans Court: a new concept for Maryland*, 47-APR Md. B.J. 42 (2014); Alana Frederick, *Veterans Treatment Courts: Analysis and Recommendations*, 38 Law & Psychol. Rev. 211 (2014); *The History,* JUST FOR VETS, http://www.justiceforvets.org/vtc-history (last visited October 14, 2016).

6 Fla. Stat. § 948.16(2).

7 Fla. Stat. §§ 943.0585 - 943.059; Chapter 11C-7, Florida Administrative Code.

8 Office of General Counsel, U.S. Dep't of Housing and Urban Development, *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (April 2016) *available at* https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHAStandCR.pdf (last visited on October 14, 2016).

9 24 C.F.R. §§ 960.204(c), 960.208(a), 982.553(d), 982.554; HUD Handbook 4350.3, REV-1, paragraphs 4–9; FAQs for Notice PIH 2015-19 / H 2015-10 *available at* http://1.usa.gov/1ZRBdfl (last visited October 14, 2016).

10 42 U.S. Code § 8013.

11 *See generally* HUD's Title VIII Fair Housing Complaint Process *available at* http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/complaint-process (last visited October 14, 2016).

U.S. District Court determines Florida's Medicaid lien statute preempted by federal law

by Floyd Faglie

In *Gallardo v. Dudek*, Case No.: 4:16cv16-MW/CAS, 2017 WL 1405166 (U.S. N.D. Fla. April 18, 2017), the U.S. District Court for the Northern District of Florida determined that § 409.910(17)(b), Fla. Stat., violates federal Medicaid law in so far as it permits the Agency for Health Care Administration (AHCA) to recover its past Medicaid payments from portions of a Medicaid recipient's settlement representing compensation for future medical expenses and requires the recipient to disprove § 409.910(11)(f)'s formula-based allocation by clear and convincing evidence. While the decision is not final due to AHCA's various motions to alter the decision and the likelihood that AHCA will appeal to the 11th Circuit Court of Appeals, the decision has tremendous benefit for Florida Medicaid recipients injured by the negligence of others. A book could be written on the history of complex litigation over Florida Medicaid liens; however, this article will provide only a brief, simplistic discussion of the issue and the recent decision.

To begin with, federal Medicaid law requires that states seek reimbursement of Medicaid expenditures from liable third parties who caused injury to Medicaid recipients. To facilitate this direction, federal law mandates that state Medicaid plans require Medicaid recipients to assign to the state their right to recover from liable third parties medical expenses paid by Medicaid. While states may seek reimbursement from third parties to the extent of the third parties' legal liability to pay for care provided by Medicaid, the federal anti-lien and anti-recovery provisions affirmatively protect a Medicaid recipient's property from the state's attempts to recover.

In 2006, the U.S. Supreme Court determined that the federal anti-lien and anti-recovery provisions prohibit states from recovering from portions of a Medicaid recipient's settlement not representing compensation for medical expenses paid by Medicaid. *See Ark. Dept. of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006). Further, the U.S. Supreme Court determined that states cannot use an irrebuttable one-size-fits-all formula to dictate payment of a Medicaid lien and a recipient must be permitted to challenge the payment of the lien through an adversarial process. *See Wos v. E.M.A.* 133 S.Ct. 1391 (2013).

In the early 1990s, Florida enacted § 409.910, providing AHCA with an absolute and draconian right to recover from a Medicaid recipient's tort settlement through a Medicaid lien, which attached to the recipient's entire settlement. The only reduction in the amount owed AHCA was a formula in § 409.910(11)(f) that entitled AHCA to either the full payment of its lien or half of the settlement after deducting from the settlement 25 percent for attorney's fees and deducting taxable costs.

After *Ahlborn*, a question arose as to whether a Florida Medicaid recipient could petition a court to limit the payment of the Medicaid lien to the past medical expense portion of a settlement or whether the (11)(f) formula dictates payment of the lien. The Florida district courts of appeal (DCA) were split, with the Fifth DCA determining that recipients could challenge the payment of the lien through the court and the Second and Third DCAs determining that the (11)(f) formula dictated payment without exception. *See Smith v. AHCA*, 24 So.3d 590 (Fla. 5DCA 2009); *Russell v. AHCA*, 23 So.3d 1266 (Fla. 2DCA 2010) *abrogated*, *AHCA v. Riley*, 119 So.3d 514 (Fla. 2DCA 2013); and *Garcon v. AHCA*, 96 So.3d 472 (Fla. 3DCA 2012) *quashed,* 150 So.3d 1101 (Fla. 2014). The U.S. Supreme Court's decision in *Wos* resolved this issue, and post-*Wos*, the Florida courts affirmed the recipient's right to challenge the payment of a Medicaid lien through the courts holding that:

> *Ahlborn* and *Wos* make clear that § 409.910(11)(f) is preempted by the federal Medicaid statute's anti-lien provision to the extent it creates an irrebuttable presumption and permits recovery beyond that portion of the Medicaid recipient's third-party recovery representing compensation for past medical expenses. *Davis v. Roberts*, 130 So.3d 264, 270 (Fla. 5DCA 2013); and *Harrell v. AHCA*, 143 So.3d 478, 480 (Fla. 1DCA 2014).

With the right to challenge the payment of a Medicaid lien through the court confirmed, a major wrinkle in regard to Florida Medicaid liens occurred. A few weeks after the 2013 *Wos* decision, the Florida Legislature amended § 409.910(17). The 2013 amendment to § 409.910(17) stripped the courts of jurisdiction to handle challenges to Medicaid liens and placed exclusive jurisdiction for such determinations at the Division of Administrative Hearings (DOAH) in Tallahassee. While that change was sudden and unforeseen, there was language in the *Wos* decision referencing the possibility of utilizing administrative procedures for allocating tort settlements. With that said, however, the ultimate issue with this new administrative procedure

continued, next page

Medicaid lien statute ...
from page 15

for determining the amount payable to AHCA from a tort settlement was the new operative sentence in § 409.910(17)(b) that outlined what recipients must prove "in order to successfully challenge the amount payable." Section 409.910(17)(b) provides that:

> In order to successfully challenge the amount payable to the agency, the recipient must prove, by clear and convincing evidence, that a lesser portion of the total recovery should be allocated as reimbursement for past and future medical expenses than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f) …

This sentence denoting what must be proven by the recipient introduced two critical issues causing a great deal of strife for recipients and their attorneys.

First, the new § 409.910(17)(b) required the recipient to prove the portion of the settlement representing not only past medical expenses, but also the amount of the settlement representing reimbursement for *future* medical expenses—permitting AHCA to recover its past Medicaid payments from the portion of a settlement compensating for *future* medical expenses. Federal Medicaid law as interpreted by the U.S. Supreme Court and applied by the Florida DCAs stated that AHCA was only permitted to recover from the portion of the settlement representing compensation for past medical expenses. The notion in § 409.910(17)(b) that AHCA could recover from the future medical expense portion of a settlement was a solid violation of federal Medicaid law. This overreach into the portion of a settlement compensating for future medical expenses created a major practical problem in almost all cases because in most tort settlements a significant portion of the settlement is for future medical expenses—thus entitling AHCA to recover all of its lien from nearly all settlements.

Second, the new § 409.910(17)(b) placed the burden of proof on the recipient to affirmatively disprove the (11)(f) formula by the onerous high level of proof of "clear and convincing evidence." This created a strange requirement that the recipient disprove by clear and convincing evidence a one-size-fits-all arbitrary formula that was divorced from any relevant fact of the case, value of damages suffered, limitations in liability or insurance coverage or actual amount of past medical expenses claimed. If the recipient failed to meet this heightened level of proof, AHCA was entitled to the arbitrary one-size-fits-all formula amount. While this strange requirement was on its face perverse, it was also violative of the direction given by the U.S. Supreme Court in *Wos*. The *Wos* court suggested the possibility that administrative procedures could be used to allocate tort settlements, but if such administrative methods were used, there must be evidence that these procedures are likely to yield reasonable results in the mine run of cases, meaning that procedures providing a payment framework should at the very least have a relation to the relevant facts of the case and lead to actual realistic results in the majority of cases.

Eventually these two problematic issues with the new (17)(b) administrative hearing process made their way into the courts. In *Giraldo v. AHCA*, 208 So.3d 244 (Fla. 1DCA 2016), and *Willoughby v. AHCA*, 212 So.3d 516 (Fla. 2DCA 2017), the question of whether federal law prohibited AHCA from recovering from the portion of a settlement representing compensation for future medical expenses was addressed. In both *Giraldo* and *Willoughby,* DOAH determined that under § 409.910(17)(b) AHCA could recover its past payments from the portion of the settlement representing future medical expenses. The First DCA in *Giraldo* held that § 409.910(17)(b) did not violate federal Medicaid law and AHCA was entitled to recover its past Medicaid payments from the future medical expense portion of the settlement.[1] A few months later, the Second DCA issued *Willoughby* and disagreed with, and certified conflict with, *Giraldo* holding that § 409.910(17)(b) violated federal Medicaid law in so far as it permitted AHCA to recover its past Medicaid payments from the portion of a settlement representing compensation for future medical expenses.

The recipient in *Giraldo* filed an appeal to the Florida Supreme Court, with the Elder Law Section, the Academy of Florida Elder Law Attorneys, the National Academy of Elder Law Attorneys, the Special Needs Alliance and the Florida Justice Association filing notice(s) of intent to file amicus briefs supporting the Medicaid recipient. *Giraldo* is waiting for the Florida Supreme Court to grant jurisdiction. AHCA filed an appeal of *Willoughby* to the Florida Supreme Court but recently dismissed its appeal.

Meanwhile, while *Giraldo* and *Willoughby* fought their battles in DOAH and the Florida appellate courts, Gianinna Gallardo filed her petition at DOAH to challenge the amount payable to AHCA from her tort settlement. Prior to her case proceeding to final hearing at DOAH, Gallardo filed a § 1983 civil rights action in the U.S. Northern District of Florida. Gallardo's 1983 action sought declaratory and injunctive relief that § 409.910(17)(b) violates federal Medicaid law in so far as it permits AHCA to recover its past Medicaid payments from the portion of her settlement representing future medical expenses and required Gallardo to affirmatively disprove the (11)(f) formula by clear and convincing evidence. With that legal determination made by the federal court, Gallardo and AHCA would return to DOAH to have the amount payable determined.

Gallardo and AHCA filed cross motions for summary judgment on the legal issue presented. On Apr. 18, 2017, U.S. District Judge Mark E. Walker issued his well-written decision granting Gallardo's motion for summary judgment. The *Gallardo* court determined that under federal

Medicaid law AHCA can only recover from the portion of the settlement representing compensation for past medical expenses and is prohibited from recovering from the portion of a settlement representing compensation for future medical expenses. Further, it is a violation of federal Medicaid law for a recipient to be required to affirmatively disprove the (11)(f) formula-based allocation with clear and convincing evidence where that allocation is arbitrary and there is no evidence to suggest that the (11)(f) formula is likely to yield reasonable results in the mine run of cases. "Portions of § 409.910(17)(b), Fla. Stat. (2016) are preempted by federal law. The State of Florida Agency for Health Care Administration is therefore enjoined from enforcing that statute in its current form." *Gallardo*, 2017 WL 1405166 at * 11.

Floyd Faglie *is a partner in the Monticello office of Staunton & Faglie PL. He handles Medicaid lien challenges at DOAH and associated appeals. He is co-counsel in Giraldo with Maegen Peek Luka at Brannock & Humphries, and co-counsel in Gallardo with Bryan Gowdy and Meredith Ross at Creed & Gowdy.*

Endnote

1 Also at issue in *Giraldo* is the clear and convincing burden of proof imposed upon the Medicaid recipient. The First DCA affirmed DOAH's determination that AHCA was entitled to the full (11)(f) formula amount after DOAH disregarded the unrebutted testimony of the Medicaid recipient's two expert witnesses and AHCA provided no witnesses or evidence.

The unlicensed practice of law in Medicaid planning: A fresh look at an old problem

by John R. Frazier

Originally published by the National Academy of Elder Law Attorneys in NAELA News. *NAELA.org*

The unlicensed practice of law (UPL) generally occurs when a person who is not a licensed attorney engages in the practice of law.[1] UPL can happen in any area of law; however, there is a growing segment of UPL of special concern to elder law clients. Medicaid planning often involves some of the most vulnerable groups of people in the United States: the elderly, and people with mental and/or physical disabilities. Many individuals who are not licensed as attorneys hold themselves out as "Medicaid planners." Those who practice law without the proper training and licensure can cause great harm to elders and people with special needs.

The challenges UPL brings to the legal profession generally

In 2011-2012, the American Bar Association Standing Committee on Client Protection conducted a survey on unlicensed practice of law programs in the United States jurisdictions.[2] This is the fourth of such surveys conducted by the committee since 1999. How the unlicensed practice of law is dealt with varies from state to state. Variability ranges from a rather elastic set of definitions of what constitutes the unlicensed practice of law, to the manner in which complaints of UPL are lodged, handled and investigated in each jurisdiction. In short, the challenges that have always riddled the management of UPL programs continue to prevail, such as:

- **There is no universal definition of the unlicensed practice of law.** UPL definitions are found in case law, court rule, statute, advisory opinion or a combination thereof. Essential to any discussion of the unlicensed practice of law is what constitutes the "practice of law." While some states have adopted broad definitions of law practice without wholly defining the practice of law for all purposes, some states have no clear definition of what really constitutes the practice of law.
- **The process of investigating UPL actions is generally "complaint driven."** In order for UPL to be managed, somebody must report it. In effect, jurisdictions may rely on citizens to be the watchdogs and whistleblowers, with respect to investigating the unlicensed practice of law.
- **Each jurisdiction is responsible for budgeting UPL enforcement.** Annual budgets vary from $0.00 to $1.6 million.
- **Each jurisdiction has its own regulatory entity authorized to enforce its UPL regulation.** This authority can include state bar committees/counsel, state supreme court committees/commissions, state attorneys general and local and county attorneys.
- **Penalties and sanctions for UPL violations** that are available to enforcement authorities include: civil injunctions, criminal fines, prison sentence, civil contempt, restitution and civil fines. Other remedies may be available, and most jurisdictions have several available remedies.

continued, next page

Unlicensed practice ...
from page 17

- **Some jurisdictions allow non-lawyers to engage in certain limited practices.** These non-lawyer practices may or may not be regulated, and the majority of these practices consist of: preparing pleadings, wills and other legal documents, attending real estate closings, pre-trial activities, negotiating legal matters, appearing in court, participating in state administrative proceedings, participating in alternative dispute resolution proceedings and preparation of immigration forms. Other jurisdictions do not allow non-attorney practice.

The survey undertaken by the ABA of the UPL programs in each jurisdiction certainly illuminates the scope of the complexities involved in UPL generally. However, to understand the true implications of UPL in the arena of Medicaid planning, it is important to pursue this further by looking at specific examples at the state level with respect to non-lawyers providing Medicaid planning services.

A sampling of jurisdictional efforts regarding UPL in Medicaid planning

The following synopsis reflects recent activities in three states—Florida, Tennessee and Ohio—that are specific to Medicaid planning and the unlicensed practice of law.

Medicaid planning and UPL in Florida

Florida does not have a definition of unlicensed practice of law. Instead, UPL is defined through case law. To determine whether a non-attorney's actions constitute UPL, the court must examine existing case law and view the non-lawyer's actions (or non-actions) in the context of these other cases.

Practicing law without a license in Florida is a third-degree felony, punishable by up to five years in prison.[3]

The Florida Supreme Court has given The Florida Bar the responsibility for investigating and prosecuting unlicensed practices of law.[4]

Before The Florida Bar can or will take investigative or prosecutorial action in a UPL allegation, someone must file a written allegation of UPL with The Florida Bar. The Florida Bar website provides information available for both attorneys and consumers.[5]

The Florida Bar Standing Committee on UPL addresses non-lawyers providing Medicaid planning services

Recently there has been a great increase in the number of non-attorney Medicaid planners who are advising the public on how to obtain Medicaid benefits in Florida. These services appear to be very similar to the services provided by attorneys who practice in elder law and Medicaid planning.[6]

The Florida Bar Standing Committee on the Unlicensed Practice of Law issued a public letter on May 13, 2009, that established certain activities that constitute clear UPL violations and some activities that would be considered on a case-by-case basis.[7] The letter was specific to the issue of non-attorneys providing Medicaid planning services.

The committee stated the activities that constitute clear UPL include: 1) establishing irrevocable trusts; 2) establishing qualified income trusts; and 3) the hiring of an attorney by a third-party company to review, prepare or modify documents for customers if payment to the attorney was through the company.[8]

Activities determined on a case-by-case basis included: 1) restructuring assets; 2) counseling customers on the best way to get Medicaid approval; and 3) advertising as an "elder counselor."[9]

The May 13, 2009, letter, in association with the Rules Regulating The Florida Bar, also pointed out there is substantial risk that an attorney could violate Florida Bar rules by affiliating with non-attorney Medicaid planners in three significant ways:[10]

1. An attorney receives a payment directly from a non-attorney Medicaid planner for services provided to a client;[11]

2. An attorney assists a non-attorney Medicaid planner in the unlicensed practice of law;[12]

3. An attorney forms a partnership with a non-attorney Medicaid planner.[13]

The committee also voted, based on existing case law, that the hiring of an attorney to review, prepare or modify documents for customers—if there was a direct relationship with the attorney and payment was made directly to the attorney—would not be UPL.[14]

Florida Bar Standing Committee on UPL petitions the Florida Supreme Court to issue an advisory opinion on what constitutes UPL in Florida Medicaid planning

In the interest of protecting the public from harm, The Florida Bar Standing Committee on UPL held that a formal advisory opinion was needed. The standing committee provided notice of and held a public hearing to address Medicaid planning UPL issues and to receive input from interested parties. The public hearing took place in Tampa, Florida, on Feb. 22, 2013.

Numerous examples of non-lawyers engaging in Medicaid planning activities were presented. Oral and written testimony revealed that non-lawyer Medicaid planners are essentially unregulated, as there is no licensing, education or advertising requirements. Testimony described the type of harm caused by non-lawyer Medicaid planners, which includes denial of Medicaid eligibility, exploitation, catastrophic or severe tax liability and the purchase of inappropriate financial products threatening or destroying clients' life savings.[15]

Testimony presented at the Tampa Florida Bar hearing established that there was harm and the potential for harm to the public, regarding the activities of non-attorney Medicaid planners.

On Jan. 15, 2014, The Florida Bar

Standing Committee on UPL submitted a request for a formal advisory opinion from the Florida Supreme Court on whether it constitutes the unlicensed practice of law for a non-attorney to engage in Medicaid planning activities leading up to the Medicaid application, specifically:[16]

- Drafting of personal service contracts;
- Preparation and execution of qualified income trusts;
- Rendering legal advice regarding the implementation of Florida law to obtain Medicaid benefits.

Florida Advisory Opinion No. SC14-211: The Florida Bar re: Advisory Opinion – Medicaid Planning Activities by Non-Lawyers

Following extensive hearings and related proceedings, on Jan. 15, 2015, the Florida Supreme Court adopted the proposed opinion of the Standing Committee on UPL of The Florida Bar. The Florida Supreme Court ruled that it is UPL for Medicaid planners who are not lawyers to engage in certain Medicaid planning activities.[17]

Except for licensed attorneys, anyone who advises Florida Medicaid applicants on how to structure their income and assets in order to become eligible for Medicaid benefits is practicing law without a license.

The Florida Advisory Opinion is an important step toward heightened public awareness of UPL activities. With proper stewardship, it can serve as incentive for the public to become a more willing partner in reporting alleged instances of UPL to The Florida Bar.

Medicaid planning activities that are UPL when practiced by a non-lawyer

The Advisory Opinion states clearly the rules whereby a non-lawyer crosses the line into the practice of law. A non-attorney individual may not:

- Draft **personal service contracts**;
- Determine the need for, prepare and execute a **qualified income trust**;
- Sell personal service contracts or **qualified income trust forms or kits** in the area of Medicaid planning;
- **Render legal advice** regarding the implementation of Florida law to obtain Medicaid benefits. This includes advising an individual on the appropriate legal strategies available for spending down and restructuring assets and the need for a personal service contract or qualified income trust.

Medicaid planning activities that a non-lawyer may legally engage in

A non-lawyer may assist a Medicaid applicant with the preparation of the actual Medicaid application, as it is authorized by federal law.

In addition, Florida Department of Children and Families (DCF) employees who are non-lawyers may legally assist Medicaid applicants with the application process as well as inform Medicaid applicants about Medicaid planning tools and eligibility laws.

A legal reason for the complaint-driven process in Florida

As a general rule, The Florida Bar will not investigate the unlicensed practice of law in Florida unless someone files a written UPL complaint under penalties of perjury with The Florida Bar.

The following case is a legal reason why the investigation of alleged UPL activity in Florida is complaint driven.

In *Surety Title Insurance Agency, Inc. v. Virginia State Bar*, [18] the plaintiff filed an action against the Virginia State Bar. The plaintiff claimed that certain advisory opinions issued by the Virginia State Bar, coupled with the threat of disciplinary proceedings against those non-attorneys who disregard the advisory opinions, illegally restrain commerce in the area of title insurance and constitute an illegal group boycott, and an attempt to monopolize, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C §§ 1 and 2.

The United States District Court for the Eastern District of Virginia held that the actions by the Virginia State Bar were in violation of federal laws that prohibit the restraint of commerce. The court held that the procedures followed by the Virginia State Bar in its efforts to regulate UPL in Virginia violated federal antitrust laws.[19]

The district court opinion was vacated by the Fourth Circuit on procedural grounds, after which the case was settled. Therefore, there was no final judicial resolution of the antitrust issue. In view of the potential antitrust exposure, state bar associations, including The Florida Bar, ceased issuing advisory opinions.[20]

Medicaid planning and UPL in Tennessee

Tennessee has a definition of UPL that is stated in Tenn. Code Ann. § 23-3-103(a) (2008). The definition is sourced from statute and case law. Regulatory entities authorized to enforce the UPL regulations are the state bar committee, Supreme Court committee/commission, attorney general, county prosecutor, and there is also a private right of action.[21]

Complaints are generally filed with the Tennessee Attorney General's Office. The Tennessee Bar Association Standing Committee on the Protection of the Public from the Unauthorized Practice of Law has also developed a sample protocol for use by local bar associations handling complaints about individuals and businesses endangering Tennessee consumers through the unauthorized practice of law. A complaint form is provided on the Office of Attorney General website.[22] The Tennessee Bar Association website[23] has information for handling UPL complaints as well.

Tennessee Opinion No. 07-166: Practice of Law; Medicaid Eligibility

On Dec. 18, 2007, the State of Tennessee Office of the Attorney General issued Opinion No. 07-166: Practice of Law; Medicaid Eligibility. In this opinion, the following questions were examined:

continued, next page

Unlicensed practice ...
from page 19

1. Whether Tenn. Code Ann. § 23-3-103(a) prohibits a non-attorney from representing the appellant in an administrative appeal of a denial of Medicaid eligibility in which the non-attorney prepares legal documents relating to the proceedings and engages in the direct and cross-examination of witnesses; *Opinion rendered:* No.[24]

2. Whether Tenn. Code Ann. § 23-3-103(a) prohibits a non-attorney from giving legal advice to persons seeking to become eligible for Medicaid benefits concerning the application of state and federal laws relating to Medicaid eligibility; *Opinion rendered:* If the legal assessments and advice regarding the application of federal or state laws relating to Medicaid eligibility offered by non-attorneys to persons seeking to become eligible for Medicaid benefits are performed for valuable consideration and require the "professional judgment of a lawyer," such conduct would constitute the unauthorized practice of law.[25]

3. Whether the answers to Questions 1 or 2 would be different if the legal services are being provided by a non-attorney with an expertise in a pertinent subject matter of the law—for instance, a Certified Senior Advisor (CSA), Certified Estate Planner (CEP), Certified Charitable Advisor (CCA) or Certified Long-Term Care Counselor (CLTCC) with a working knowledge of the Medicaid laws; *Opinion rendered:* No.[26]

Medicaid planning and UPL in Ohio

In Ohio, UPL is defined through definition, under Rule VII of the Supreme Court Rules for the Government of the Bar of Ohio.[27] The definition of the unauthorized practice of law is further developed on a case-by-case basis by the Supreme Court of Ohio.[28]

Practicing law without a license in Ohio is subject to civil injunction, civil contempt and civil fine.[29] Complaints of unauthorized practice of law are to be lodged with the Office of Disciplinary Counsel, the local bar association's Unauthorized Practice of Law Committee or to the secretary of the Board on the Unauthorized Practice of Law. Complaints received will be investigated and if considered probable cause to warrant a hearing, a formal complaint will be filed with the Board on the Unauthorized Practice of Law.[30]

Ohio Advisory Opinion UPL 11-01: Medicaid Assistance and Planning by Non-Attorneys

On Oct. 7, 2011, the Board on the Unauthorized Practice of Law of The Supreme Court of Ohio issued Advisory Opinion UPL 11-01 entitled "Medicaid Assistance and Planning by Non-Attorneys." In this opinion, the Court examined whether Medicaid planning and application activities constitute the practice of law.

The Court concluded that non-attorneys may review documents, prepare and file Medicaid applications and attend state hearings on behalf of an individual "to the extent that those activities are authorized by federal law." However, only attorneys may engage in Medicaid planning activity.[31]

The opinion goes on to specify:

> Medicaid planning, which consists of arranging assets and income to meet Medicaid eligibility requirements, is outside the scope of the non-attorney assistance permitted by federal law. State regulation of Medicaid planning is therefore not preempted by federal law. In many cases, Medicaid planning involves estate work and legal expertise. Accordingly, the board further concludes that the establishment of a Medicaid planning strategy for another by a non-attorney constitutes the unauthorized practice of law.[32]

In forming this opinion, UPL 11-01 cites Tennessee Attorney General Opinion 07-166.

Problems with the complaint-driven approach

- Since it is up to the UPL victim to lodge the complaint, actual reported complaints represent a mere fraction of the UPL sum. If we are to consider a state's complaint data, we only have a partial picture of the extent of this problem in the elder law field. The elderly and the disabled—and their families—are often unaware they have been victimized, at least at first. Overwhelmed seniors may be ashamed that they were not sophisticated enough to know they were victimized. They may be afraid to come forth, unaware of the proper channels through which to lodge a complaint, or intimidated by the legal system.
- Nobody wants to be the whistleblower. There is a historic reluctance for people to report on and expose an individual's or a company's wrong or damaging actions upon others. This creates a kind of "code of silence" from the stigma of being labeled an informant.
- In today's litigious society, individuals who file UPL complaints may have a concern that they themselves may be sued by the person they report to the regulatory entity of their jurisdiction.
- Considering the Virginia State Bar was sued on antitrust grounds, the potential for future antitrust lawsuits against state bar associations likely perpetuates the complaint-driven nature of the UPL disciplinary process.

Moving forward: Our duty as elder law practitioners

The absence of reporting UPL in turn only encourages its continuance. By reporting UPL, a higher virtue is served by respecting the well-being of others. It is acting responsibly on behalf of society by reporting wrong behavior.

We must take a proactive stand to inform our clients and their families about UPL within the framework of Medicaid planning, and encourage them to report alleged instances of UPL to regulatory authorities.

As elder law practitioners, our involvement in increasing the awareness among the public as well as among nursing home and assisted living employees may be one of the

most effective ways to combat UPL in Medicaid planning throughout the United States.

John R. Frazier, JD, LLM, MBA, *is a Florida elder law attorney. He is a member of the NAELA Florida Chapter, the Academy of Florida Elder Law Attorneys (AFELA).*

Endnotes

1 John R. Frazier, "The Cost of Remaining Silent About the Unlicensed Practice of Law," http://www.estatelegalplanning.com/unlicensed-practice-of-law.html (accessed June 6, 2015).

2 http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2012_upl_report_final.authcheckdam.pdf (accessed June 6, 2015).

3 Florida Statutes, Title XXXII, Ch. 454.23, http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0400-0499/0454/0454.html (accessed June 6, 2015).

4 "Rules Regulating The Florida Bar," Rule 10-1.2, http://www.floridabar.org/divexe/rrtfb.nsf/FV/3AA92E254CA01FB585256BC200450EC5 (accessed June 6, 2015).

5 http://www.floridabar.org/DIVCOM/PI/WebNodes.nsf/Nodes/2462A48BF92BCBE3852577E000485BA7 (accessed June 6, 2015).

6 John R. Frazier, *Protecting Your Family's Assets: How to Legally Use Medicaid to Pay for Nursing Home and Assisted Living Care*, 2nd ed. Florida, Rainbow Books Inc., 2012, 170.

7 Public letter issued by The Florida Bar Standing Committee for Unlicensed Practice of Law, dated 13 May 2009.

8 Public letter issued by The Florida Bar Standing Committee for Unlicensed Practice of Law, dated 13 May 2009.

9 Public letter issued by The Florida Bar Standing Committee for Unlicensed Practice of Law, dated 13 May 2009.

10 Public letter issued by The Florida Bar Standing Committee for Unlicensed Practice of Law, dated 13 May 2009.

11 Public letter issued by The Florida Bar Standing Committee for Unlicensed Practice of Law, dated 13 May 2009.

12 Public letter issued by The Florida Bar Standing Committee for Unlicensed Practice of Law, dated 13 May 2009.

13 Public letter issued by The Florida Bar Standing Committee for Unlicensed Practice of Law, dated 13 May 2009.

14 Public letter issued by The Florida Bar Standing Committee for Unlicensed Practice of Law, dated 13 May 2009.

15 FAO #2011-4, Medicaid Planning Activities by Nonlawyers, The Florida Bar Standing Committee on the Unlicensed Practice of Law, Revised Proposed Advisory Opinion, October 14, 2014.

16 http://www.floridasupremecourt.org/decisions/2015/sc14-211.pdf (accessed June 6, 2015).

17 http://www.floridasupremecourt.org/decisions/2015/sc14-211.pdf (accessed June 6, 2015).

18 *Surety Title Insurance Agency, Inc. v. Virginia State Bar*, 431 F. Supp. 298 (E.D. Va. 1977), vacated and remanded with instructions, 571 F.2d 205 (4th Cir. 1978).

19 *Id.*

20 Robert M. Sondak, "Access to Courts and the Unauthorized Practice of Law—Ten Years of Unlicensed Practice of Law Advisory Opinions," http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/Author/63732A4EBC94779F85256ADB005D6239 (accessed July 7, 2015).

21 http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2012_upl_report_final.authcheckdam.pdf (accessed June 6, 2015).

22 http://www.tn.gov/attorneygeneral/upl/upl.html (accessed June 6, 2015).

23 http://www.tba.org/committee/unauthorized-practice-of-law/resources (accessed June 6, 2015).

24 State of Tennessee Office of the Attorney General issued Opinion No. 07-166; Practice of Law; Medicaid Eligibility.

25 State of Tennessee Office of the Attorney General issued Opinion No. 07-166; Practice of Law; Medicaid Eligibility.

26 State of Tennessee Office of the Attorney General issued Opinion No. 07-166; Practice of Law; Medicaid Eligibility.

27 http://www.supremecourt.ohio.gov/LegalResources/Rules/govbar/govbar.pdf#Rule7 (accessed June 6, 2015).

28 http://www.supremecourt.ohio.gov/Boards/UPL/faq/uplfaq.asp (accessed June 6, 2015).

29 http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2012_upl_report_final.authcheckdam.pdf (accessed June 6, 2015).

30 http://www.supremecourt.ohio.gov/Boards/UPL/faq/uplfaq.asp (accessed June 6, 2015).

31 Board on the Unauthorized Practice of Law of The Supreme Court of Ohio; Advisory Opinion UPL 11-01; Issued: October 7, 2011; Medicaid Assistance and Planning by Nonattorneys; http://www.sconet.state.oh.us/Boards/UPL/advisory_opinions/UPLAdvOp_11_01.pdf (accessed June 6, 2015).

32 Board on the Unauthorized Practice of Law of The Supreme Court of Ohio; Advisory Opinion UPL 11-01; Issued: October 7, 2011; Medicaid Assistance and Planning by Nonattorneys; http://www.sconet.state.oh.us/Boards/UPL/advisory_opinions/UPLAdvOp_11_01.pdf (accessed June 6, 2015).

Evaluating professional designations utilized by financial advisors

by David A. Weintraub

So, a local financial advisor hands you a business card listing one or more of the following professional designations: CFP, CFPN, CPFA, CMA, CFMP, CDP and/or CEA. Should you be impressed? What do the letters stand for? Who are the issuing organizations? Do the issuing organizations exist? Were there prerequisites for obtaining the designations? Were examinations required? What types of examinations? Was a college degree required? Are there continuing education requirements? Are the continuing education requirements meaningful? Can you verify the authenticity of the designation? Does the issuing organization address customer complaints? Does the issuing organization publish a list of disciplined designees?

Confused? You should be. According to records maintained by FINRA (Financial Industry Regulatory Authority), there are more than 150 known "professional designations" either in use today by financial advisors or that have previously been used by financial advisors. Some of these designations look, sound and feel remarkably similar to each other. As an example, what is the difference between a CFP and a CFPN? Are they issued by the same organization? Are they connected with each other in any way? They are not.

CFP is a designation known as "Certified Financial Planner." It is issued by the Certified Financial Planner Board of Standards, Inc. CFPN is known as "Christian Financial Professionals Network Certified Member." Though the abbreviations are similar, that is where the similarities end. The prerequisites for earning the Certified Financial Planner designation are indeed rigorous. The prerequisites for the CFPN designation are less clear. According to FINRA, one is eligible for the CFPN certification with 10 years of full-time financial experience, signing a "Statement of Faith," taking three training sessions and passing a closed-book exam. Links on the FINRA website to the Christian Financial Professional Network take you to *cfpn.org*. It is unclear whether this organization still exists, notwithstanding the fact that FINRA's website states that the designation is currently offered. Web searches lead to an entity called Kingdom Advisors, which offers what it calls a Certified Kingdom Advisor designation. According to its website, its designation "allows you to work with someone who has committed and been trained to be a person of character who, from a biblical worldview, serves you with biblical financial advice so that you can confidently navigate financial decisions as a faithful steward."

It is up to each lawyer to diligently determine the value, if any, to place on certain designations. Both the American National Standards Institute and the National Commission for Certifying Agencies accredit certain designations. The following link lists the accredited designations: *finra.org/investors/accredited-designations*. FINRA also maintains a list of designations about which it is aware: *finra.org/investors/professional-designations*.

It behooves any attorney who is referring clients to financial advisors to investigate their backgrounds. One piece of this investigation is verifying any claimed designation and assessing its value. The CFP board's website contains a section dedicated to verifying whether one's CFP designation is in good standing. It takes about five minutes to confirm this particular designation. Time well spent.

David A. Weintraub, Esq., *practices securities arbitration and litigation in Plantation, Fla. He is co-chair of the ELS Abuse, Neglect & Exploitation Committee.*

What you need to know about Florida's updated elective share law

Submitted by Amy J. Fanzlaw and Amy Mason Collins on behalf of the Estate Planning Committee

Effective July 1, 2017, Florida's elective share laws, which exist to protect a surviving spouse from the intentional (or unintentional) disinheritance at a decedent spouse's death, are changing in several significant ways.

The elective share is 30 percent of a decedent's "elective estate," which consists of all assets the decedent held an interest in at death.[1] Highly technical rules under Chapter 732, Florida Statutes, govern not only the assets included in the elective estate, but also how those assets are valued. An elective share award is in addition to the surviving spouse's other property rights as a result of the decedent spouse's death.

When originally introduced as SB 724, the elective share bill sought to change the elective share percentage, but this change was omitted from the final enacted version.[2] Instead, arguably the most significant changes emanating from this enactment remedy an anomaly that has occurred based on the ownership and title to the marital residence and whether the marital residence was considered "protected homestead."[3]

"Protected homestead" is property that meets the constitutional definition of homestead, but specifically excludes homestead property titled as tenants by the entireties (TBE) or as joint tenants with rights of survivorship (JTWROS).[4] Until these amendments, protected homestead was excluded from the calculation of the elective estate[5] and was not considered an asset to satisfy the elective share[6] whereas a marital residence owned as TBE or JTWROS with the surviving spouse was included in the calculation at one-half of the fair market value of the property on the date of death.[7] As a result, a surviving spouse without TBE or JTWROS ownership in the marital residence would net a larger share of the decedent's estate (i.e., an interest in homestead plus the elective share) than a surviving spouse with TBE or JTWROS ownership in the marital residence (i.e., only the elective share, which was partially satisfied by the interest in the marital residence).

Under the 2017 amendments to the elective share statutes, protected homestead is included in the elective estate.[8] This ensures that regardless of how the marital residence (i.e., the homestead) is titled, the elective share calculation takes into account all interest in the homestead received by a surviving spouse upon the decedent's death, no matter how that interest passes to the surviving spouse. The only circumstance under which protected homestead is still specifically excluded from the elective estate is where a surviving spouse does not receive any interest in the protected homestead because homestead rights were validly waived during the decedent's lifetime through a pre- or post-marital agreement, thus preventing a surviving spouse from circumventing the marital agreement by indirectly claiming a portion of the homestead's value through the elective share.[9]

Under the new law, protected homestead is valued in one of three ways, for purposes of determining the elective estate and satisfying the elective share: 1) at the date-of-death fair market value, if the surviving spouse takes a fee simple interest; 2) at one-half of the date-of-death fair market value, if the surviving spouse takes a life estate under § 732.401(1) or validly elects to take an undivided one-half interest as a tenant in common under § 732.401(2); or 3) at the value of the interest taken as determined under statutes valuing non-homestead property interests, if the surviving spouse validly waived homestead rights but still receives an interest in protected homestead other than an interest described in § 732.401.[10]

Other significant modifications to the elective share laws include the following:

- To encourage settlement and prompt resolution of elective share disputes, the direct recipients and beneficiaries who are required to pay the surviving spouse some portion of the elective share from property received upon the decedent's death must pay interest at the statutory rate on any contribution still outstanding after two years.[11]
- Statutory interest may be charged two years after the decedent's date of death even if an order of contribution has not yet been entered.[12]
- While current statutes allow a surviving spouse to petition to extend the time to make an election at any time prior to the deadline (i.e., six months after service of the notice of administration), the statutes were revised to allow a petition to extend time within the latter of six months after service of the notice of administration or 40 days after termination of any proceeding affecting satisfaction of the elective share, but in no event more than two years after the decedent's date of death.[13]
- A finding of bad faith in pursuing the elective share is no longer required to assess attorney's fees against a surviving spouse.[14] Instead, fees and costs may be awarded to *any* party as in chancery actions, harkening to the prevailing party rule used elsewhere in the probate and trust codes.[15] Moreover, a court may

continued, next page

Elective share law ...
from page 23

direct that payment be made from the estate, from a party's interest in the elective share or elective estate or from a party's other property.[16]

- If a surviving spouse is forced to file a petition to determine the amount of elective share because the personal representative does not, the surviving spouse may get additional fees and costs for doing so.[17]
- Section 738.606 of Florida's Principal and Income Act is expanded to include elective share trusts for which no election for the marital deduction is made for federal estate tax purposes.[18]

Changes to the elective share laws apply to decedents whose death occurred on or after July 1, 2017.[19] The provisions governing attorney's fees apply to all proceedings commenced on or after July 1, 2017, regardless of the decedent's date of death.[20]

Amy J. Fanzlaw *is board certified by The Florida Bar in elder law and in wills, trusts and estates and practices in Boca Raton, Fla. She is a member of The Florida Bar's Elder Law Certification Committee, and she frequently lectures and consults on various planning topics, including everyone's favorite, homestead.*

Amy Mason Collins *is an associate attorney with Waldoch & McConnaughhay PA in Tallahassee, Fla. She practices in the areas of guardianship, estate planning and estate and trust administration. She is a co-chair of the Estate Planning and Probate Committee of the Elder Law Section.*

Endnotes

1 *See* § 732.2065, Fla. Stat.

2 The original bill provided a graduated scale based on the number of years the surviving spouse was married to the decedent, from 10 percent for marriages less than five years to 40 percent for marriages of 25-plus years. Cf. Fla. SB 724 (as introduced Feb. 6, 2017) to CS for CS for SB 724 (ER Apr. 28, 2017); *see* ch. 2017-121, Laws of Fla.

3 For purposes of this article, it is assumed a marital residence otherwise meets the constitutional definition of homestead under § 4, art. 10, Fla. Const.

4 *See* § 731.201(33), Fla. Stat.

5 § 732.2045(1)(i), Fla. Stat.

6 § 732.2075, Fla. Stat.

7 *See* §§ 732.2035(3), 732.2075, Fla. Stat.

8 *See* ch. 2017-121, § 2, Laws of Fla. (to be codified at § 732.2035(2), Fla. Stat.).

9 *See* ch. 2017-121, § 3, Laws of Fla. (to be codified at § 732.2045(l)(i), Fla. Stat.).

10 *See* ch. 2017-121, §§ 4, 7, Laws of Fla. (to be codified at §§ 732.2055(1)(a), 732.2095(1)(a)6, (2), Fla. Stat.). Valuing a surviving spouse's life estate interest in the protected homestead under § 732.401(1) at one-half of fair market value seems logical since the surviving spouse has the unilateral right to elect a 50 percent interest under § 732.401(2), Fla. Stat.

11 *See* ch. 2017-121, § 6, Laws of Fla. (to be codified at § 732.2085(3)(a), Fla. Stat.).

12 *See* ch. 2017-121, § 10, Laws of Fla. (to be codified at § 732.2145(1), Fla. Stat.).

13 *See* ch. 2017-121, § 9, Laws of Fla. (to be codified at § 732.2135(2), Fla. Stat.).

14 *See* ch. 2017-121, § 9, Laws of Fla. (deleting § 732.2135(5), Fla. Stat.).

15 *See* ch. 2017-121, § 11, Laws of Fla. (to be codified at § 732.2151(1), Fla. Stat.).

16 *See* ch. 2017-121, § 11, Laws of Fla. (to be codified at § 732.2151(2), Fla. Stat.).

17 *See* ch. 2017-121, § 11, Laws of Fla. (to be codified at § 732.2151(3), Fla. Stat.).

18 *See* ch. 2017-121, § 12, Laws of Fla. (to be codified at § 738.606(1), Fla. Stat.).

19 *See* ch. 2017-121, §§ 13-14, Laws of Fla.

20 *See* ch. 2017-121, § 11, Laws of Fla. (to be codified at § 732.2151(4), Fla. Stat.).

Nursing home care for veterans

by Javier A. Centonzio

Many of us have the privilege of serving clients who are military veterans. This is in part due to the number of veterans here in Florida; the state has the third largest veteran population of any state, behind California and Texas. As elder law attorneys tasked with assisting our clients to obtain and pay for long-term care, we must have a basic understanding of what long-term care benefits are available to clients who have served our country. A wide variety of benefits are attainable through the Department of Veterans Affairs (VA). For the purposes of this article, we will focus on benefits related to VA nursing home care.

Nursing home care is one of the least understood benefits available to veterans. This is probably because up until Nov. 30, 1999, the VA had discretion on whether or not to provide nursing home care for veterans. After November 1999, the VA must provide nursing home care for veterans who: 1) are in need of nursing home care for a service-connected disability; or 2) are in need of nursing home care and have a combined service-connected disability rating of 70 percent or higher (this includes veterans who are rated at 60 percent or higher and are unemployable or are rated "total and permanent"). If eligible, the veteran can be provided either "intermediate" or "skilled" care at a nursing home.

Once a veteran is deemed eligible for nursing home care, the veteran may be placed in a community living center (CLC), a community nursing home (CNHC) or a state veterans home. Some veterans may be required to pay copays for nursing home care.

Community living centers

Community living centers are

specialized nursing facilities located at some VA medical centers. A veteran's VA physician usually initiates the process to admit the veteran to a CLC. Requests for admission to a CLC may be from within the VA system, but the process can be initiated outside of the VA system by using VA Form 10-10EC, Application for Extended Care Benefits. Once the application for admission is filed, the veteran's eligibility for nursing home care is confirmed and then the application is referred to a screening committee to make recommendations for care. This committee may contact the veteran's physician to gather further information about the veteran and his or her health care needs.

Veterans who are in need of nursing home care for a service-connected disability and veterans with a combined service-connected disability rating of at least 70 percent who need nursing home care have priority and can receive free nursing home care in a CLC. Veterans who do not meet either of those criteria may receive care in a CLC if space and resources are available. Some examples of the types of services provided for veterans by the CLC are short stay (90 days or less); long stay (more than 90 days); short-stay rehabilitation (time-limited and goal-directed to return the veteran to independent functioning); short-stay dementia care (to stabilize symptoms and meet ongoing needs—return to home or community is expected); long-stay dementia care; and palliative care (includes hospice care).

In order to be admitted to a CLC, the VA requires that: 1) the veteran be medically and psychiatrically stable; 2) the primary type of service be documented and categorized into short-stay or long-stay services; 3) the anticipated length of stay be documented; 4) the anticipated discharge date and discharge destination from the CLC be documented; and 5) the veteran's priority for the CLC be established and documented. The veteran can be discharged from the CLC if treatment goals have been met; the facility cannot accommodate the veteran due to a change in care needs; or the veteran shows flagrant disregard for the policies of the medical center.

Community nursing home care

Community nursing home care provides veterans with care in a public or private nursing home at the VA's expense. This is also commonly referred to as contract nursing home care. Application for placement in a community nursing home is normally made by the patient's physician, nurse or social worker using VA Form 10-0415, Geriatrics and Extended Care Referral.

Veterans who require nursing home care for a service-connected disability or veterans who were previously discharged from a VA hospital and are currently receiving home health care services from the VA are eligible for direct admission to a community nursing home. Veterans who are receiving care in a VA facility—such as hospital, outpatient, domiciliary or nursing home care—may be transferred to a community nursing home if the VA determines that nursing home care is necessary.

There is no time limit on community nursing home care for veterans who need nursing home care for a service-connected disability. For all other veterans, community nursing home care is limited to six months unless the VA determines that a longer period of community nursing home care is warranted.

State veterans homes

Florida, like many other states, has state-run facilities called state veterans homes. These state veterans homes are owned by the state and receive financial aid from the VA in the form of per diem aid that covers a portion of the cost of a veteran's care. The per diem aid provided by the VA cannot exceed one-half the cost of providing care for the veteran. State veterans homes provide several levels of care, including hospital care, nursing home care, domiciliary care and, in some cases, adult day health care.

In order for a veteran to receive per diem aid from the VA, the veteran must meet the VA's eligibility requirement for the type of care he or she is seeking. For example, a veteran who needs nursing home care in a state veterans home must meet the VA's eligibility requirements for nursing home care. The veteran is responsible for paying the portion of the cost of care not covered by the VA per diem aid. This can be paid by the veteran, the veteran's family or Medicaid. A veteran who is a Medicaid beneficiary will be able to keep $90 of the monthly pension payment he or she receives at the aid and attendance level.

State veterans homes may have their own set of eligibility requirements above and beyond what the VA requires, such as a requirement that a veteran be a resident of a state for a specified amount of time. Some state homes even provide care to spouses and surviving spouses of veterans. You can find out a particular state veterans home eligibility requirements and the services its offers by contacting the facility to request that information. A list of facilities is included with this article.

Finding long-term care solutions for our clients can be a challenging task, but it is helpful to know that there are other options available to our clients who are veterans. The VA's website, *va.gov,* is a great resource for attorneys looking for more information about the benefits available to veterans and their dependents. The VA also has an entire section of its website dedicated to geriatrics and extended care, which can be found at *va.gov/geriatrics/*. The geriatric and extended care section of the website contains several worksheets and handouts that can be given to your clients to help provide them with information about the services provided by the VA.

We are privileged to practice law in a state that is heavily populated by veterans, and as elder law attorneys, it's important that we all have a basic understanding of how to incorporate VA benefits into our planning and practices.

continued, page 27

Deducting the cost of life in an assisted living facility

by Marc J. Soss

Many individuals in our aging population are transitioning from home ownership to life in an assisted living facility (ALF). Many ALFs require a one-time entry fee and ongoing monthly charges for housing and services (meal plans, housekeeping, transportation and social/recreational activities). The benefit of an ALF is that when a resident's health and personal care needs become more acute, they are not forced to move to a new facility, as their level of service can be increased to include long-term care and skilled nursing care. Although the costs of an ALF can be substantial,[1] a percentage or all of the costs can be deducted as a medical expense income tax deduction either by the individual or by a third party if that taxpayer is providing more than half of the resident's support.

Section 213(a) of the Internal Revenue Code (IRC) allows as a deduction any expenses that are paid during the taxable year for the medical care of the taxpayer, his or her spouse and dependents who are not compensated by insurance or otherwise. *Estate of Smith v. Commissioner,* 79 T.C. 313, 318 (1982). The deduction is allowed only to the extent the amount exceeds 7.5 percent of adjusted gross income. Sec. 213(a); sec. 1.213-1(a)(3), Income Tax Regs. For purposes of Sec. 213, the term medical care includes amounts paid "for the diagnosis, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting any structure or function of the body."

The entire ALF cost, including room and board, can be fully deducted on a federal income tax return as a medical expense if the individual's health problems are classified as being chronically ill and if the appropriate services are "provided pursuant to a plan of care prescribed by a licensed health care practitioner" (physician, registered professional nurse or licensed social worker). An individual will qualify as chronically ill if a licensed health care practitioner certifies that the individual: 1) is unable to perform at least two basic activities of daily living (including eating, toileting, transferring, bathing, dressing) without assistance from another individual due to loss of functional capacity for at least 90 days; or 2) requires substantial supervision to be protected from threats to health and safety due to severe cognitive impairment.

For elders in our community who are paying these significant costs out of pocket, and are reaching into their taxable investments such as individual retirement accounts to do so, this deduction opportunity could represent a significant cost savings.

Marc J. Soss, Esq., *focuses his practice on estate planning, probate and trust administration and litigation and guardianship law in Southwest Florida. He has published articles in The Florida Bar, Rhode Island Bar, North Carolina Bar, LISI and Association of the United States Navy. He also serves as an officer in the United States Naval Reserve.*

Endnote

1 The monthly cost of an ALF in Florida is approximately $2,500 to $5,000 for regular assisted living and $5,000 to $7,500 for memory care.

Judicial performance feedback sought from Bar members

The Judicial Administration & Evaluation Committee is encouraging all Bar members to participate in the Confidential Judicial Feedback Program developed by the committee and approved by The Florida Bar Board of Governors.

The purpose of the Confidential Judicial Feedback Program is to promote judicial self-improvement and enhance the quality of our judiciary as a whole. Attorneys are asked to evaluate the judge's demeanor, knowledge, fairness, and other factors, but not to discuss issues of their specific cases. The commenting attorney's identity is kept confidential and the comments are provided only to the judge who is the subject of the review. All feedback is and remains confidential pursuant to Florida Rule of Judicial Administration 2.051(c)(4).

There are separate forms for trial court judges and appellate court judges. Feedback may be provided two ways" by competing the forms online at www.floridabar.org/JudicialFeedback or by downloading the forms at www.floridabar.org/JAEC and following the instructions.

Sovereign citizen faces unlawful practice of law charge in Florida

by Bill Morlin

In a rare criminal filing, an antigovernment sovereign citizen in Florida faces a felony charge of unlawful practice of law—pretending to be an attorney in a court of law—by representing parents whose children were taken from them by state authorities.

Ronnie Lee Davis, who heads a cult-like sovereign group called "Bear's Law and Forensic Science," advertised that his operation offered the "golden ticket" to help parents whose children were removed from their homes for neglect or abuse by Child Protective Service workers.

He provided those services to "clients" in at least two states, Idaho and Florida, before he was named in a warrant issued earlier this year in Pasco County, Florida, charging him with unlawful practice of law there.

"We at the Bear's Law and Forensics Team comprehend the law and the plight of parents who have lost their children," Davis' advertisement claimed.

The ads boast that Davis and his team "have fought the devils who claim to be helping children [who] in reality are violating federal kidnapping laws." His ads cite the usual legal-sounding mumbo jumbo—references to the Uniform Commercial Code and the Constitution—frequent hallmarks of sovereign citizens.

The new unlawful practice of law charge in Florida was filed while Davis, 49, was in jail on separately filed charges of armed kidnapping and false imprisonment related to allegations he kidnapped a Texas woman who visited his group's compound near Polk City, Florida. He lives and provides his legal services from that facility with other members of his "forensic team" who haven't been charged at this point.

In a plea deal, Davis pleaded guilty to lesser charges of battery and possession of a firearm by a convicted felon. He is now in state prison, serving time for those crimes, scheduled for release on Nov. 23.

continued, next page

Nursing home care ...
from page 25

Florida state veterans homes

Lake City: Robert H. Jenkins Jr. Veterans Domiciliary Home (Assisted Living Facility)
751 SE Sycamore Terrace, Lake City, FL 32025 • 386/758-0600
Panama City: Clifford C. Sims State Veterans Nursing Home
4419 Tram Road Panama City, FL 32404 • 850/747-5401
Port Charlotte: Douglas T. Jacobson State Veterans Nursing Home
21281 Grayton Terrace, Port Charlotte, FL 33954 • 941/613-0919
Daytona Beach: Emory L. Bennett State Veterans Nursing Home
1920 Mason Avenue, Daytona Beach, FL 32117 • 386/274-3460
Land-O-Lakes: Baldomero Lopez State Veterans Nursing Home
6919 Parkway Blvd., Land O' Lakes, FL 34639 • 813/558-5000
Pembroke Pines: Alexander "Sandy" Nininger Veterans Nursing Home
8401 West Cypress Drive, Pembroke Pines, FL 33025 • 954/985-4824
St. Augustine: Clyde E. Lassen State Veterans Nursing Home
4650 State Road 16, St Augustine, FL 32092 • 904/940-2193

***Javier A. Centonzio, Esq.**, is a partner and co-founder of Weylie Centonzio PLLC. He received the JD with a Certificate of Concentration in Advocacy from Stetson University College of Law. He also completed the LLM in elder law at Stetson. He is co-chair of the ELS Veterans Benefits Committee.*

Sovereign citizen...
from page 27

Because he hasn't been formally arraigned yet on the unlawful practice of law charge, the details in the formal charging documents aren't yet public record.

However, Hatewatch learned of the new felony charge after Florida Circuit Judge Lynn Tepper filed a formal complaint with The Florida Bar, contending Davis had represented himself as an attorney to her and a client in a courtroom proceeding.

A copy of that judge's complaint, subsequently obtained under Florida's public records laws, says Davis "appeared by phone before the Court on May 26, 2016 and participated in the hearing as the attorney representing the mother." The mother, whose identity isn't in the document, believed Ronnie Davis was a licensed attorney after seeing his Bear's Law advertisements and Facebook posts.

The Florida Bar passed the judge's complaint on to the assistant state attorneys for the state Sixth Circuit handling matters in Pinellas and Pasco counties.

Davis, it appears, has been active in the sovereign citizen circuit for some time. Earlier this year it was reported that Davis had served as a "judge" for the notorious Bruce Doucette, of Colorado, who claims he's the "Superior Court Judge of the Continental uNited States of America."

Doucette set up a network of common law courts in Alaska, Colorado, Florida and Hawaii before being indicted in Colorado on multiple criminal charges, including racketeering, attempting to influence a public servant, extortion, criminal impersonation, retaliation against a judge and tax evasion.

Last year, Davis and his "law and forensics" firm were involved in attempting to intervene on behalf of a Caldwell, Idaho woman. She had been arrested on witness intimidation charges while claiming her children were illegally taken from her by Child Protective Services workers.

After her arrest, Davis pledged in an online video that his "marshals" would seek the arrests of the judge and officers involved in her case.

Meanwhile in Florida, state prosecutors—deluged with other cases related to sovereign citizens, who frequently act as their own attorneys and clog the criminal justice system with bogus and often-nonsensical and baseless legal filings—say it's fairly rare to charge a sovereign citizen with unlawful practice of law.

The case against Davis may only be the second time prosecutors in Florida have charged a sovereign citizen with unlawful practice of law.

Mark Pitcavage, an expert on sovereign citizens and other extremists, said there have been a handful of other cases in the United States

"Sovereigns get into trouble every once in a while for practicing law without a license but not as often as one might think," said Pitcavage. "This might be because they get hit with more serious charges instead, in some instances, or it might be because authorities don't really think about that charge as a possibility."

Last year, another sovereign citizen, Anthony Williams, who claimed he didn't need a license to practice law, was convicted in Broward County of unlawful practice of law. Williams had been caught twice driving without a license—one of the most-common techniques of sovereign citizens who don't believe they need a driver's license or license plates to drive.

Williams, claiming to be a "private attorney general," who represented himself in court, was sentenced to only six months in jail but was placed on probation for 22 years.

In Florida, the state Bar and the State Supreme Court appear to take the unlicensed practice of law seriously.

Just three years ago The Florida Bar issued a written advisory opinion, subsequently embraced by the state's Supreme Court, making it illegal for non-lawyers involved in Medicaid cases to draft personal services contracts, prepare and execute income trusts or render legal advice about Florida law in Medicaid applications.

"As an attorney, it is particularly disturbing to hear about individuals who are charged with the crime of the unlicensed practice of law," John R. Frazier, who practices in Largo, Florida, told Hatewatch after being told about the Davis case. Frazier was involved in initiating the process that led to the new advisory opinion about the unlicensed practice of law.

"People who seek legal advice may be facing one of the most difficult situations that they have ever faced in their lives, and they may also be in a very vulnerable position," said Frazier, who specializes in elder law. "Persons who are not licensed attorneys, who provide legal advice the public, can cause great harm to the public."

Frazier recalled a New Jersey Supreme Court case in which a state justice wrote, "The amateur at law is as dangerous to the community as an amateur surgeon would be."

Reprinted with permission from Southern Poverty Law Center, Hatewatch, June 16, 2017, spicenter.org

In response to the Florida Legislature's passage in May of the bill permitting electronic wills, the Elder Law Section voiced its concern to the governor in the following letter. We are pleased with the governor's decision to veto the bill.

THE FLORIDA BAR
ELDER LAW SECTION

The Elder Law Section cultivates and promotes expertise and professionalism in the practice of law affecting people as they age and individuals with special needs.

Honorable Rick Scott
Governor of the State of Florida
Plaza Level/PL05
Tallahassee, Florida 32399

Dear Governor Scott:

On behalf of the Elder Law Section of the Florida Bar, I am writing to express our concerns with House Bill 277 dealing with electronic wills.

As you know, over the past few years Florida has enacted some of the strictest exploitation statutes in the country. You and the Legislature are to be commended for ensuring that these bills were adopted to safeguard our most vulnerable citizens, and we were pleased to play an active role in the development of these new laws.

With regard to House Bill 277, we understand the desire by some groups to ensure that people have access to crafting their wills — we see first hand the consequences of someone not having a will when they pass away. However, we also see first hand the many times that family members or care givers try to influence their family members or patients to make changes to their wills and steal their assets. Further, we believe that the unintended consequence of House Bill 277 is to create additional opportunities or pathways for people to prey upon and exploit the elderly and vulnerable populations.

Specifically, our concerns are as follows:

*The bill permits "remote presence/remote notarization" of the will. While The bill permits "remote presence/ remote notarization" of the will. *While the bill permits the creation of electronic living wills that establish end of life determinations. We believe that end of life decisions should not be made or changed via an electronic form, especially if the witnesses and notary are not present. Such a situation further lends to exploiting or vulnerable citizens, possibly during their final days.

Finally, with regard to the use of a video link to validate the legitimacy of the will, there is no way to determine if undue influence has occurred. For example, if there was someone in the room pressuring the person signing the will, it would not be apparent via video. Equally troubling is the provision that if the video is not able to be located, then 2 disinterested persons, stating the will has been safely kept since the date of signing, can validate the will.

Often people sign new wills that invalidate older wills-- it will be unclear pursuant to this new legislation whether a new will has been created. Again, we believe another opportunity for some to exploit a person after their death to take the assets.

There are other issues of concern in this bill as well, and while several of our suggestions were ultimately included in the final bill, we continue to believe that sufficient safeguards are not in place. Indeed, the Legislature adopted amendments prior to adoption to delay implementation of the bill until April 1, 2018 to provide time over the summer and fall to continue working on these issues. If the bill needs continued work over the summer and fall before implementation, would it not be better to start fresh, work over the summer to address the concerns, establish a well appointed work group and then adopt a bill that does not require delayed implementation?

On behalf of the Section, we will continue to make ourselves available to ensure that we have a format that provides options to our citizens while also providing safeguards for our most vulnerable citizens.

We are grateful for the opportunity to provide you with our concerns with House Bill 277.

Sincerely,
Ellen S. Morris
Ellen S. Morris, Esq.
Chair

SECTION SCENE

Elder Law Section Executive Council Meeting & Awards Reception

June 23, 2017

Boca Raton Resort & Club • Boca Raton, Florida

TFB President Michael Higer and President-Elect Michelle Suskauer stop by to visit the Elder Law Section Executive Council Meeting. Pictured left to right are Collett Small, chair, Elder Law Section; Michael Higer, president, The Florida Bar; Michelle Suskauer, president-elect, The Florida Bar; and Ellen Morris, immediate past chair, Elder Law Section.

Shannon Miller receives the 2016-2017 Member of the Year Award, presented by Ellen Morris during the Awards Reception.

Twyla Sketchley receives the 2016-2017 Charlotte Brayer Award, presented by Ellen Morris during the Awards Reception.

Collett Small and Ellen Morris pose together as Collett assumes her role as chair of the Elder Law Section.

Section Scene

Members of the Elder Law Section listen to reports during the Executive Council Meeting held during The Florida Bar Annual Convention.

Gifts are presented to Ellen Morris for her dedicated service as the 2016-2017 chair of the Elder Law Section of The Florida Bar.

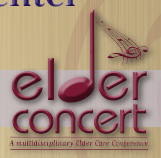
Collett Small and her parents celebrate as she is passed the gavel to become the 2017-2018 chair of the Elder Law Section.

REGISTER NOW!

Elder Concert Program Schedule

Florida Atlantic University Student Union Conference Center

September 28, 2017



8:00-9:00 AM — **REGISTRATION & CONTINENTAL BREAKFAST**

9:00-10:15 AM — **SESSION ONE**

House Chambers — **Protecting Your Legal Rights: Disability and Police Interactions**
Matthew Dietz, Esq., Litigation Director of Disability Independence Group, Inc.

Majestic Palm A — **Identifying, Qualifying & Applying for VA Benefits**
Arlene Hechter Lakin, Esq., Florida Bar Board Certified Elder Law Attorney

Majestic Palm B — **Gray Divorce**
Alyse November, LCSW, Founder, Different Like Me
Karen Greene, President/CEO Hired Hearts, Inc., Nurse Care Mgr. & National Certified Guardian
Tammy Saltzman, Esq., TBS LAW, P.A.

Sago Palm — **Successfully Navigating Long Term Care Programs**
Katie Petrassi, Medicaid Manager, ADRC

10:15-10:30 AM — **BREAK**

10:30-11:45 AM — **SESSION TWO**

House Chamber — **Advanced Medicaid Strategies with Special Needs Trust**
Travis Finchum, Esq., Florida Bar Board Certified Elder Law Attorney,
President, Special Needs Lawyers, P.A

Majestic Palm A — **The Importance of Social History in Caring for Someone with Alzheimer's or Dementia**
Scott Greenberg, President/CEO Comforcare Homecare
Naomi Shapiro, MSW, Program Director, Jewish Family Services

Majestic Palm B — **Should We Consider Cognitive Screening as the Sixth Vital Sign?**
Karen L. Gilbert, RN, MS, CDP,
VP, Education and Quality Assurance, Alzheimer's Community Care

Sago Palm — **Psychology and Geriatrics: Integrated Care for an Aging Population**
Dr. Benjamin Bensadon, Associate Director, FAU Internal Medicine Residency, Geriatrics & Palliative Care Rotation & Bensadon Medical Psychology & Geriatrics, PLLC

11:45-1:15 PM — **KEYNOTE LUNCHEON**
Guardianship: A View from the Bench–Current Issues and Developments
Honorable Mark Alan Speiser, Circuit Court Judge, Administrative Judge, Probate Division
Seventeenth Judicial Circuit of Florida

1:15-2:30 PM — **SESSION THREE**

House Chambers — **Exploitation of Vulnerable Adults in Florida**
Twyla Sketchley Esq., Florida Bar Board Certified Elder Law Attorney,
Owner of The Sketchley Method and The Sketchley Law Firm
Kathryn Perrin, Esq., Attorney, Kitroser & Associates

Majestic Palm A — **Avoiding Impoverishment from the Cost of Long—Term Care**
Scott Solkoff, Esq., Florida Bar Board Certified Elder Law Attorney,
Founder, Elder Law College, President, Solkoff Legal, P.A.

Majestic Palm B — **Self-Care for Professionals: Avoid Burnout- The Management of Compassionate Fatigue**
Jenni Frumer, PhD, LCSW, RG, Chief Executive Officer Alpert Jewish Family & Children's Service

Sago Palm — **Confusion can be Confusing: Delirium and Older Adults**
Dr. Deborah D'Avolio, Ph.D., BC-ACNP, ANP Associate Professor FAU College of Nursing;
Fellow in the Gerontological Society of America and National Academies of Practice
Michelle Kunz, CSA Prof. Patient Advocate, Owner of Senior Care Management

2:30-2:50 PM — **BREAK**

2:50-4:20 PM — **SESSION FOUR**

House Chambers — **Protecting Your Legal Rights: Disability and Police Interactions**
Matthew Dietz, Esq., Litigation Director of Disability Independence Group, Inc.

Majestic Palm A — **Gray Divorce**
Alyse November, LCSW, Founder, Different Like Me
Karen Greene, President/CEO Hired Hearts, Inc., Nurse Care Mgr. & National Certified Guardian
Tammy Saltzman, Esq., TBS LAW, P.A.

Majestic Palm B — **Exploitation in Guardianship: The Morality Issue**
Jetta L. Getty, NCG, CG, CPGW, BS

Sago Palm — **Confusion can be Confusing; Delirium and Older Adults**
Dr. Deborah D'Avolio, Ph.D., BC-ACNP, ANP
Associate Professor FAU College of Nursing, Fellow in the Gerontological Society of America and National Academies of Practice

Register NOW at
https://elderconcert2017.eventbrite.com

SECTION NEWS

Mark your calendar!

September 28, 2017
Elder Concert 2017
A Multidisciplinary Elder Care Conference
Student Union Building
Florida Atlantic University
Boca Raton, Florida
Register NOW at *https://elderconcert2017.eventbrite.com*

October 5-8, 2017
Elder Law Section Retreat
Half Moon Resort
Montego Bay, Jamaica

January 11-13, 2018
Essentials of Elder Law
Elder Law Annual Update & Hot Topics
Loews Portofino Bay Hotel
Orlando, Florida

Visit *eldersection.org/calendar/* for details.

SECTION NEWS

Visit the Elder Law Section on Facebook

We are happy to announce that the Elder Law Section has created a Facebook page. The page will help promote upcoming section events as well as provide valuable information related to the field of elder law.

Part of the section's mission is to "cultivate and promote professionalism, expertise, and knowledge in the practice of law regarding issues affecting the elderly and persons with special needs…" We see this Facebook page as a way of helping to promote information needed by our members.

We need your help. Please take a few moments and "Like" the section's page. You can search on Facebook for "Elder Law Section of The Florida Bar" or visit *facebook.com/FloridaBarElderLawSection/*.

If you have any suggestions or would like to help with this social media campaign, please contact Jason Waddell at 850/434-8500 or *jason@ourfamilyattorney.com*.

Thank you to our annual sponsors!

We are extremely excited to announce that the Elder Law Section has two sponsors for 2017! **Guardian Trust** will once again be a section sponsor, and **ElderCounsel** has also signed on as a section sponsor.

Their support allows the section to continue to provide cutting-edge legal training, advocacy support and great events like the Annual Update and Hot Topics in Orlando. Both organizations have long supported the ELS; however, this level of support exhibits a higher commitment and to the section's mission and its members. We hope our ELS members will **take time to thank them** for their support!

Committees keep you current on practice issues

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

PUBLICATIONS

Kristina Maria Tilson
2655 S. Le Jeune Road, Ste. 700-J
Coral Gables, FL 33134-5832
786/597-3565
kristinatilson@gmail.com

Heather B. Samuels
Solkoff Legal PA
2605 W. Atlantic Avenue, Ste. A103
Delray Beach, FL 33445-4416
561/733-4242
hsamuels@solkoff.com

ABUSE, NEGLECT & EXPLOITATION

David A. Weintraub
7805 SW 6th Court
Plantation, FL 33324-3203
954/693-7577
954/693-7578 (fax)
daw@stockbrokerlitigation.com

Ellen L. Cheek
Bay Area Legal Services Inc.
1302 N. 19th Street
Tampa, FL 33605-5230
813/232-1343, ext. 121
813/248-9922 (fax)
echeek@bals.org

BUDGET

Carolyn Landon
5707 S. Dixie Highway, Ste. B
West Palm Beach, FL 33405-3693
carolyn@landonlaw.net

CERTIFICATION

Victoria E. Heuler
Heuler-Wakeman Law Group PL
1677 Mahan Center Blvd.
Tallahassee, FL 32308-5454
850/421-2400
850/421-2403 (fax)
victoria@hwelderlaw.com

CONTINUING LEGAL EDUCATION

Sam Boone, Jr.
4545 NW 8th Avenue, Ste. A
Gainesville, FL 32605-4522
352/374-8308
352/375-2283 (fax)
sboone@boonelaw.com

Marjorie Wolasky
9400 S. Dadeland Blvd., PH 4
Miami, FL 33156
305/670-7005
mwolasky@wolasky.com

ESTATE PLANNING & ADVANCE DIRECTIVES, PROBATE

Horacio Sosa
2924 Davie Road, Ste. 102
Davie, FL 33314
954/532-9447
954/337-3819 (fax)
hsosa@sosalegal.com

Amy Mason Collins
1709 Hermitage Blvd., Ste. 102
Tallahassee, FL 32308
850/385-1246
850/681-7074 (fax)
amy@mclawgroup.com

ETHICS

Steven E. Hitchcock
Hitchcock Law Group
901 Chestnut Street, Ste. D
Clearwater, FL 33756-5618
727/223-3644
727/223-3479 (fax)
hitchcocklawyer@gmail.com

GUARDIANSHIP

Debra Slater
5411 N. University Drive, Ste. 201
Coral Springs, FL 33067
954/753-4388
954/753-4399 (fax)
dslater@slaterlaw.com

Twyla L. Sketchley
The Sketchley Law Firm PA
3689 Coolidge Court, Unit 8
Tallahassee, FL 32311-7912
850/894-0152
850/894-0634 (fax)
service@sketchleylaw.com

LAW SCHOOL LIAISON

Enrique Zamora
Zamora, Hillman & Villavicencio
3006 Aviation Avenue, Ste. 4C
Coconut Grove, FL 33133-3866
305/285-0285
305/285-3285 (fax)
ezamora@zhlaw.net

Alex Cuello
2655 S. Le Jeune Road, Ste. 1008
Coral Gables, FL 33134-5803
305/567-1710
305/669-1079 (fax)
ac440@bellsouth.net

LEGISLATIVE

William A. Johnson
William A. Johnson PA
140 Interlachen Road, Ste. B
Melbourne, FL 32940-1995
321/253-1667
321/242-8417 (fax)
wjohnson@floridaelderlaw.net

Shannon M. Miller
The Miller Elder Law Firm
6224 NW 43rd Street, Ste. B
Gainesville, FL 32653-8874
352/379-1900
352/379-3926 (fax)
shannon@millerelderlawfirm.com

MEDICAID/GOVERNMENT BENEFITS

John S. Clardy III
Clardy Law Firm PA
243 NE 7th Street
Crystal River, FL 34428-3517
352/795-2946
352/795-2821 (fax)
clardy@tampabay.rr.com

Heidi M. Brown
Osterhout & McKinney PA
3783 Seago Lane
Fort Myers, FL 33901-8113
239/939-4888
239/277-0601 (fax)
heidib@omplaw.com

continued, next page

Committees . . .
from page 35

MEMBERSHIP

Donna R. McMillan
McCarthy Summers et. al.
2400 SE Federal Highway, Fourth Floor
Stuart, FL 34994
772/286-1700
drm@mccarthysummers.com

MENTORING

Stephanie M. Villavicencio
Zamora, Hillman & Villavicencio
3006 Aviation Avenue, Ste. 4C
Coconut Grove, FL 33133-3866
305/285-0285
305/285-3285 (fax)
svillavicencio@zhlaw.net

Raiza M. Reyes
David Howard Goldberg PL
1 SE 3rd Avenue, Ste. 1940
Miami, FL 33131-1704
305/760-8888
305/760-8889 (fax)
raiza@dhgpl-law.com

SPECIAL NEEDS TRUST

Travis D. Finchum
Special Needs Lawyers PA
901 Chestnut Street, Ste. C
Clearwater, FL 33756-5618
727/443-7898
727/631-9070 (fax)
travis@specialneedslawyers.com

Howard S. Krooks
Elder Law Associates PA
7284 W. Palmetto Park Road, Ste. 101
Boca Raton, FL 33433-3406
561/750-3850
561/750-4069 (fax)
hkrooks@elderlawassociates.com

SPONSORSHIP

Jason A. Waddell
Waddell & Waddell PA
1108 N. 12th Avenue, Ste. A
Pensacola, FL 32501-3308
850/434-8500
850/434-0971 (fax)
jason@ourfamilyattorney.com

Jill Robin Ginsberg
Ginsberg Shulman PL
401 E. Las Olas Blvd., Ste 1400
Fort Lauderdale, FL 33301-2218
954/332-2310
954/827-0440 (fax)
jill@ginsbergshulman.com

UNLICENSED PRACTICE OF LAW

John Frazier
John R. Frazier JD, LLM, PLC/Jos. Pippen PL
10225 Ulmerton Road, # 11
Largo, FL 33771-3538
727/586-3306, ext. 104
727/586-6276 (fax)
john@attypip.com

Leonard E. Mondschein
The Elder Law Center of Mondschein
10691 N. Kendall Drive, Ste. 205
Miami, FL 33176-1595
305/274-0955
305/596-0832
lenlaw1@aol.com

VETERANS BENEFITS

Javier Andres Centonzio
Weylie Centonzio PLLC
8240 118th Avenue, Ste. 300
Largo, FL 33773-5014
727/490-8712
727/490-8712 (fax)
jac@wclawfl.com

WEBSITE

Jason A. Waddell
Waddell & Waddell PA
1108 N. 12th Avenue, Ste. A
Pensacola, FL 32501-3308
850/434-8500
850/434-0971 (fax)
jason@ourfamilyattorney.com

Alison E. Hickman
Grady H. Williams, Jr., LL.M.
Attorneys at Law PA
1543 Kingsley Avenue, Ste. 5
Orange Park, FL 32073-4583
904/264-8800
904/264-0155 (fax)
alison@floridaelder.com

For more information about committees, visit *eldersection.org/committees/*.

COMMITTEE REPORTS

Abuse, Neglect & Exploitation

Ellen Cheek and David Weintraub, co-chairs

We are pleased to announce that the Abuse, Neglect & Exploitation Committee will begin a series of monthly conference calls on the fourth Tuesday of every month at 2 p.m., beginning on September 26. It is anticipated that meetings will last approximately one hour.

The committee is co-chaired this year by David Weintraub and Ellen Cheek. David is a veteran co-chair with special expertise in financial/securities litigation. Ellen is new to the job but not to the issues of abuse, neglect and exploitation of Florida's seniors; as a legal services attorney, she has advised low-income seniors on a variety of issues, and she has a special interest in exploitative sales and financing practices that target the elderly. We hope that our combined perspectives and diverse contacts make for an excellent year of discussions about many topics.

We look forward to hearing from you about the topics you would like to hear about (and topics about which you would like to present!). Please join us for the first meeting in September to discuss upcoming agendas. If you have ideas, comments or questions to raise for consideration at the first meeting, please do not hesitate to contact us. We look forward to hearing from you!

David Weintraub
daw@stockbrokerlitigation.com

Ellen Cheek
echeek@bals.org

Continuing Legal Education

Sam Boone, Jr., and Marjorie's Wolasky, co-chairs

The CLE Committee continues to work with the Executive Committee to develop CLE programs for 2017-2018. Plans are underway for another great Essentials of Elder Law and the Elder Law Annual Update & Hot Topics to be held Jan. 11-13, 2018, at the Loews Portofino Bay Hotel in Orlando. These programs are considered some of the best in the field and are always well attended. If you will be attending, you should make your hotel reservation soon. The reservations link is on the Elder Law Section's website (*eldersection.org/calendar/*).

Legislative

Shannon M. Miller and William A. Johnson, co-chairs

Are big changes on the horizon?

After a stunning end to the 2017 Legislative Session, which included Governor Scott vetoing the Electronic Wills bill, we are hoping the upcoming legislative session will be without big surprises.

William "Bill" Johnson will continue in his role as co-chair of the Legislative Committee, and Shannon Miller will start her tenure as co-chair, following in the big shoes of Scott Selis—we mean huge! We are starting off the year reviewing various issues related to elective share, homestead and arbitration in nursing home contracts, as well as potentially some new legislation regarding exploitation.

Our committee has its door open for new faces, people who enjoy political challenges, writing white papers, schmoozing with politicians and drafting statutes! We need workers. Join us every other Friday at 8:30 a.m., and then every Friday beginning December 1 (subject to change) as we prepare for the start of the 2018 Legislative Session on January 9. Please email Bill or Shannon to join the committee at *wjohnson@floridaelderlaw.net* or *shannon@millerelderlawfirm.com*. We are looking forward to another exciting year of advocacy.

COMMITTEE REPORTS

Medicaid/Government Benefits

John Clardy and Heidi M. Brown, co-chairs

The Medicaid/Government Benefits Committee meets by telephone conference call the first and third Tuesday of each month at 12 noon Eastern.

The committee discusses many different issues affecting Medicaid on our conference calls. Over the past year we discussed whether assisted living facility fees can be used as a deduction of pre-existing medical expenses (PEME) for patient responsibility for ICP and HCBS Medicaid purposes. We also discussed issues with filing Medicaid applications with DCF and lack of timeliness of level of care determinations by CARES.

The committee started a project where we monitor new Florida administrative rules from DCF, AHCA and DOEA to see if the new rule will affect elderly persons on Medicaid. We also reviewed the new provider handbook for nursing facility services coverage policy from AHCA, the PASRR rule amendments and the new policy manual for the SMMC-LTC waiver.

During the 2017 Legislative Session, we as a committee reviewed and provided input to the section's Legislative Committee on proposed legislation affecting HMO liability, Medicaid managed care, the Medicaid waiver program and related issues. As health care continues to be a major state and federal issue, the Medicaid Committee expects many challenges and changes to the way elderly and disabled Floridians are provided care.

To join the Medicaid Committee, please contact John Clardy at *clardy@tampabay.rr.com* or Heidi M. Brown at *heidib@omplaw.com*.

Special Needs Trust

Travis D. Finchum and Howard S. Krooks, co-chairs

The Special Needs Trust Committee is continuing its work and is looking for anyone interested in learning more about, and working on, special needs trust issues. We have a talented group with a lot of knowledge to share. Upcoming projects include:

- Work on the next SNT CLE program
- Determine whether to take on a legislative revision of the QSNT provisions in Florida Statute; publish an article comparing and contrasting the QSNT with the elective share trust
- "Trigger trusts" for both third-party and self-settled trusts that allow toggling from a countable to an exempt third-party SNT or a d4A; publish an article on the subject
- Continue to follow and provide analysis and input for any proposed legislation regarding SNTs and particularly the RPPTL's bill on revisions to 736 regarding decanting and trustee notifications

Our calls are on the second Tuesday of each month at 5 p.m. and last less than an hour. Contact Travis Finchum at *travis@specialneedslawyers.com* to be added to the committee.

PRACTICE MANAGEMENT

Law practice tips & tricks: 9 ways to use Adobe like a pro

by Audrey J. Ehrhardt

Are you one of the many people who want to learn how to use Adobe, but just don't know how? The numerous features that Adobe has make it very appealing to the customer, but it also makes Adobe a complicated tool to learn quickly. Teaching yourself Adobe without any assistance can be a daunting (*see* multi-hour) task. The good news? There are a great quantity of resources, support and community forums out there for you to get the most out of Adobe, even from the company itself on the Adobe support website.

Looking for practice enhancements to add? Adobe offers multiple products: InDesign for design work; PhotoShop for your photos; and Document Cloud (DC) for your workflow, to name a few. You can license one or multiple products in your office.

Here are our 9 Best Practice Tips to help you gain a better understanding of how to use Adobe and its most versatile tools:

Take time to learn. Accept the fact that learning how to use Adobe effortlessly will not happen overnight! Any new skill takes practice, and the same is true for using Adobe. It will take several times to learn each tool and master it correctly. Be prepared that the product may update periodically as well, requiring a realignment on your end when that happens.

Break the learning into pieces. All of the Adobe products have feature after feature after feature, all layered on top of each other. This is excellent news for your office efficiency and productivity, but can be a hard learning curve initially. Instead of tackling the whole software at one time, create miniature goals for yourself. Make a list of the key features that drew you to the program and decide which one you want to add each week. Set aside an hour or two each week to work with the software until you are comfortable using it every day.

Learn the integration from Microsoft Word to Adobe Pro. For professional offices, being able to save a word processing document into a PDF is essential. It is also important to be able to take a document out of PDF format and into a word processing format. Keep in mind, word processing isn't the only Adobe exporting feature. You can also export to picture files, Excel and other file types you need in your office. To start, make sure both software programs on your computer recognize each other and then try out the functionality.

Don't forget security. You may not want to send or use an unsecure PDF. Adobe DC has security functions that allow you to set a password, control user access and lock the original PDF. Using the Publishing Sensitive Information feature is a tool you want to become familiar with and then decide how you and your team will use it in your office.

Learn to create a document ready for e-signature. One of the best features of Adobe DC is the ability to create a document that is ready to sign. After you have exported your document from your word processor into Adobe, you can use Adobe Sign to prepare it for signature. Adobe intuitively fills in the signature boxes for you within the tool.

Master the Pen Tool. The Pen Tool allows you to create many different designs and graphics, and attorneys can also use it to write, comment and highlight important parts of an Adobe document. This multipurpose tool is a good one to learn from the start.

You can edit PDFs in Adobe as well. (This is a different part of Adobe; it is called Acrobat DC.) Through Adobe you can add text boxes, remove language you do not want and edit text within your PDF. This can make your PDFs more useful and comprehensive in your practice.

Learn to save your documents. One of the most fundamental parts of using Adobe is knowing how to save your documents. After all, you don't want to spend hours of time just to find out the document saved to your computer incorrectly and is unable to be viewed. When saving your document, you need to make sure you save it as the correct file type. For example, you do not want to save a .doc as a .pdf. Make sure you pay attention to these details and train your team.

Use it anywhere! Gone are the days when you or your employees need to be tethered to a desk. Adobe DC can be used across multiple devices including tablets and smartphones. Decide how this feature can best support your practice and train your team. When using a tool like this, don't forget to address device security in your technology procedures manual.

There are so many resources and tutorials out there for beginners using Adobe. If you don't master something within the first week, keep trying and push yourself; you will succeed. Remember, at the end of the day, you hold the keys to your own success!

***Audrey J. Ehrhardt, JD, CBC**, builds successful law firms and corporations across the country. A former Florida elder law attorney, she is the founder of practice42, llc, a strategic development firm for attorneys. She focuses her time creating solutions in the four major areas of practice development: business strategy, marketing today, building team and the administrative ecosystem. Join the conversation at **practice42.com**.*

Intake forms and procedures: The devil is in the details

Tips & Tales

by Kara Evans

The tale: Estate planning attorney Don Friendly was known as a very personable fellow. He spent a lot of time talking with his clients, but only jotted a few shorthand notes in his illegible scrawl. In 2005, he retired and moved to Costa Rica where he later died. The young attorney who took over his practice is now trying to probate the estates of some of Don's old clients. One client had no close family and named Don as his personal representative. The new attorney cannot find the beneficiaries or next of kin listed in the will and is unable to read Don's cryptic notes. He has no notion of who the client's heirs might be. Don took all this information with him to the grave.

The tip: Don should have used an intake form. A properly drafted intake form should give you all the information you need not only to create an estate plan but to carry out your client's wishes after his or her death. You should have a standard form that is easily adapted for clients with unusual circumstances. There should be a section for the client's name, address, phone and social security number, and that of the spouse if the client is married. Also include a section for the same information for the children and their spouses and grandchildren. Your client should have space to list all of their assets as well as any liabilities. Your form will also have a place for your client to list advisors, personal representatives, trustees, etc. You will need to know how to contact these individuals. Be sure to review the duties and responsibilities of each of these positions. It will help your client to make better decisions about whom to appoint.

Of course, having a client fill out your intake form is all well and good, but you cannot always determine your client's needs by just looking at the form. A detailed intake form along with a probing interview of your client is essential. Knowing how many children a client has is important. Knowing if a child or a grandchild is disabled, adopted, a stepchild, a spendthrift or a felon is better. Knowing if a client is married is important. Knowing if this is a first, second, third or fourth marriage, and how long the couple has been married is better. Knowing if a client's parents are still alive is important. Knowing if those parents are healthy or in a nursing home is better. Knowing if a client is divorced is important. Knowing if there is a divorce decree that limits or directs testate directions is better.

Your job as an estate planning attorney is to listen to your clients. Listen to their goals, their unvarnished assessments of their children, their concerns and their fears. You must ask questions that will allow your clients to express their desires. Ask the probing and uncomfortable questions such as: Are there any children from outside this marriage? Will you be providing for your daughter's stepchildren? How do you feel about your children's spouses? Have any of your children or heirs predeceased you? Will you be providing for the children of the decedent's family? Are your children financially responsible? Do you support other family/non-family members? Do you want to disinherit someone?

Sometimes, clients come in and want to talk, and may give you all the information you could possibly need to assist them. Sometimes they don't want to tell you anything. Think of your task as one of problem solving. The client has a problem (how to plan his or her estate) and you can help put together a strategy to solve that problem. Good intake procedures help you accomplish all the above. Your clients count on you to be the professional. Be sure your office intake procedures live up to those expectations.

***Kara Evans** is a sole practitioner with offices located in Tampa, Lutz and Spring Hill, Fla. She is board certified in elder law and concentrates her practice in elder law, wills, trusts and estates.*

Tax filing changes for clients and their attorneys

TAX TIPS

by Michael A. Lampert

Defaulted retirement plan loans treated as premature distribution

In *Dora M. Martinez,* TC Memo 2016-182, the court held that a defaulted loan from a retirement plan is a taxable distribution. In *Martinez* the taxpayer took $33,000 in loans from her retirement plan. When the taxpayer defaulted on the loan repayment, the plan sponsor issued a 1099-R, treating the defaulted loan as a taxable distribution. Not only was the taxpayer hit with the tax on the "distribution," because she was under age 59½, she was also hit with the IRC § 72 penalty tax for premature distributions. And to top it off, the taxpayer was hit (triple play?) with an accuracy-related penalty. The tax court did not agree with her argument that it was not taxable because she continued to receive payment notices after the default. The court also noted that she made no effort to determine the correct reporting of the 1099-R.

IRA and retirement plan rollovers—new procedure

It is not uncommon for a client to inadvertently miss the 60-day time limit for properly rolling a retirement plan distribution to another retirement plan or Individual Retirement Account (IRA). Miss the time limit and the client cannot make the tax deferred rollover unless he or she has requested and received a private letter ruling from the IRS. In IR-2016-113 (Aug. 24, 2016), the IRS explained how eligible taxpayers, encountering a variety of mitigating circumstances, can qualify for a waiver of the 60-day time limit and avoid possible early distribution taxes. In addition, the revenue procedure includes a sample self-certification letter that a taxpayer can use to notify the administrator or trustee of the retirement plan or IRA receiving the rollover that the taxpayer qualifies for the waiver.

A taxpayer who misses the time limit will now ordinarily qualify for a waiver if one or more of these 11 circumstances apply:

1. An error was committed by the financial institution receiving the contribution or making the distribution to which the contribution relates;
2. The distribution, having been made in the form of a check, was misplaced and never cashed;
3. The distribution was deposited into and remained in an account that the taxpayer mistakenly thought was an eligible retirement plan;
4. The taxpayer's principal residence was severely damaged;
5. A member of the taxpayer's family died;
6. The taxpayer or a member of the taxpayer's family was seriously ill;
7. The taxpayer was incarcerated;
8. Restrictions were imposed by a foreign country;
9. A postal error occurred;
10. The distribution was made on account of a levy under § 6331 and the proceeds of the levy were returned to the taxpayer; or
11. The party making the distribution to which the rollover relates delayed providing information required by the receiving plan or the IRA to complete the rollover, despite the taxpayer's reasonable efforts to obtain the information.

continued, next page

Tax Tips . . .
from page 41

Ordinarily, the IRS and plan administrators and trustees will honor a taxpayer's truthful self-certification that he or she qualifies for a waiver under these circumstances. Moreover, even if a taxpayer does not self-certify, the IRS now has the authority to grant a waiver during a subsequent examination. This will be very helpful in an audit. Other requirements, along with a copy of a sample self-certification letter, can be found in the revenue procedure.

Practice tip: When possible, it is generally safer to make plan rollovers "plan to plan" ("trustee to trustee"). This can avoid issues regarding the deadline and other aspects of improper rollover.

Same-sex spouses—recovering the generation skipping tax (GST), estate and gift tax exclusion amount

Prior to same-sex spouses being treated as married for federal tax purposes, there were various transfers that did not qualify for the marital deduction. In some cases this resulted in utilization of some or all of the estate/gift tax applicable exclusion amount and even utilization of the GST amount.

In IRS Notice 2017-15, IRB 2017-6, the IRS has provided guidance to same-sex spouses under which taxpayers and executors can recover the applicable exclusion amount regarding interspousal transfers that, prior to current law, did not qualify for the marital deduction. This also applies to GST transfers regarding one or more of the persons in the same-sex marriage.

What is particularly helpful with this relief is that it applies even if the statute of limitations has expired. When filing Form 709, Gift (and Generation-Skipping Transfer) Tax Return, amended Form 709 (if within the limitations period) or Form 706, Estate (and Generation-Skipping Transfer) Tax Return, simply add a statement on the top of the form that it is being filed pursuant to the notice.

Residency still matters

For years we have warned our snowbird clients to clearly establish primary domicile in Florida. I have often explained to clients that as they drive to Florida they can stop at the first Florida welcome station, hold up the ceremonial cup of Florida orange juice, declare that they intend to be a Florida resident and drink the juice. For most purposes they have become Florida residents, or more accurately, Florida domiciliaries. Unfortunately, as we know, while Florida is glad to have these clients as residents, their "former" state is not as eager to see them go.

With the significant increase in the federal estate tax exemption amount and with many states, as a minimum, piggybacking on the federal exemption amount, does state residency still matter? While state death tax is still an issue for some clients, state income tax on clients is often much more critical. If the client is treated as a resident by a state with an income tax, the client will be subject to that state's income tax. In addition to snowbird states such as New York, Illinois, Pennsylvania or one of the other states with a state income tax, remember that some cities, such as New York City and Philadelphia, also have a city-imposed income tax.

It is not uncommon for a snowbird client to file a "final" resident state income tax return when changing residence to Florida; however, if the "former" state many years later treats the client as a resident, the client can be subject not only to the back income tax but also to interest and penalties on the unpaid tax. In addition, there is generally no statute of limitations. Why? Because a tax return was never filed. And the problem does not necessarily end at death; a state can proceed against an estate for the decedent's back income taxes (interest and penalties) along with any applicable death tax. And it is not just a day count that determines state domicile (in fact, remember that one night is really two days), nor is it necessarily one specific factor that determines domicile.

The recent New York case of *In the Matter of the Petition of Weisen, N.Y.S. Division of Tax Appeals*, ALJ, Dkt. No. 826284, 06/01/2017, is instructive and a warning not to be complacent.

As reported in *Checkpoint*, with some additional comments by me, an administrative law judge (ALJ) concluded that a taxpayer failed to prove by clear and convincing evidence that he changed his domicile from New York City to Florida during the 2007 and 2008 tax years.

The ALJ noted that in determining whether a change in domicile has occurred, keeping a permanent place of abode in the location of the historic domicile is a factor, and in this instance, the taxpayer retained his rent-stabilized New York City apartment (held since 1980) and continued to use the apartment for himself and his son during the periods at issue. In addition, the taxpayer signed a two-year renewal lease extending his tenancy to 2010. The taxpayer also received mail at his New York City address for rent-stabilization ownership, property management, maintenance, phone service and credit cards, and his personal belongings and cars were maintained at both his New York City apartment and his East Hampton property (purchased in 1999). The taxpayer's New York City address was also listed on his IRS filings the same year he applied for his 2008 Florida homestead exemption.

The taxpayer also spent a great deal of time in New York. In 2007, the taxpayer spent at least 214 days in New York City, 46 days in East Hampton and 66 days in Florida, with 33 days unaccounted for; and in 2008, he spent 91 days in New York City, 80 days in East Hampton and 180 days in Florida, with 11 days unaccounted for. The ALJ observed that although the taxpayer purchased a condo in South Florida in 2001, registered to vote in Florida in 2004 and obtained a Florida driving license, the record

did not reveal any historic use of the Florida property, or the sense that the taxpayer regarded his Florida residence with "sentiment, feeling and permanent association."

Ignoring the lack of provable time in Florida and out of New York, the taxpayer did not do some of the most basic residency activities. He had significant activities in New York including the address used on income tax returns, creditor billings and a significant number of personal accounts. The taxpayer also did what best can be described as a crime—continuing to treat the New York residence as a rent-controlled primary residence, yet also filing for and purporting to maintain Florida homestead. While it is understandable that the taxpayer lost 2007, with only 66 days in Florida and upward of 260 days in New York, it appears that in 2008 the taxpayer spent more time in Florida. Yet the taxpayer's lack of Florida-centered actions led the court to hold, as noted above, that the record did not reveal the sense that the taxpayer regarded his Florida residence with the requisite "sentiment, feeling and permanent association."

Be careful and continue to warn your clients.

Alternative to an estate tax closing letter

Traditionally, after filing Form 706, Estate (and Generation-Skipping Transfer) Tax Return, the "goal" is to obtain a closing letter. In the past, a closing letter was issued automatically after the return was either accepted as filed or adjusted and agreed to by the taxpayer. Beginning June 1, 2015, if a closing letter is desired, it needs to be requested. The request needs to be made no earlier than four months after filing the return.

IRS Notice 2017-12 provides an alternative to a closing letter. For confirmation that the IRS's examination of an estate tax return has been completed and is closed, estates and their authorized representatives can request an account transcript in lieu of an estate tax closing letter. Receipt of an account transcript with a transaction code 421, like receipt of an estate tax closing letter, confirms the closing of the IRS's examination of the estate tax return.

Estates and their authorized representatives may request an account transcript by filing Form 4506-T, Request for Transcript of Tax Return. Currently, Form 4506-T can be filed with the IRS via mail or facsimile (per the instructions on the form). Although account transcripts for estate tax returns are not currently available through the IRS's online Transcript Delivery System, the IRS website, *irs.gov,* will have current information should an automated method become operational. To allow time for processing the estate tax return, requests should be made no earlier than four months after filing the estate return.

For those who wish to continue to receive estate tax closing letters, estates and their authorized representatives may call the IRS at 866/699-4083 to request an estate tax closing letter. The request should be made no earlier than four months after filing the estate tax return.

Passport denial/revocation for seriously delinquent tax debt

The IRS is finally beginning to take steps to implement I.R.C. § 7345. Under this section, the IRS is to certify taxpayers with seriously delinquent tax debt to the U.S. State Department for revocation or denial of the taxpayer's passport. The State Department will generally not issue or renew a passport after receiving certification from the IRS.

Seriously delinquent tax debt is an individual's unpaid, legally enforceable federal tax debt totaling more than $50,000 (including interest and penalties) for which a:

- Notice of federal tax lien has been filed and all administrative remedies under IRC § 6320 have lapsed or been exhausted; or
- Levy has been issued.

Some tax debt is not included in determining seriously delinquent tax debt even if it meets the above criteria. It includes tax debt:

- Being paid in a timely manner under an installment agreement entered into with the IRS;
- Being paid in a timely manner under an offer in compromise accepted by the IRS or a settlement agreement entered into with the U.S. Justice Department;
- For which a collection due process hearing is timely requested in connection with a levy to collect debt; or
- For which collection has been suspended because a request for innocent spouse relief under IRS § 6015 has been made.

Before denying a passport, the State Department will hold the taxpayer's application for 90 days to allow the taxpayer to:

- Resolve any erroneous certification issues;
- Make full payment of the tax debt; or
- Enter into a satisfactory payment alternative with the IRS.

There is no grace period for resolving the debt before the State Department revokes a passport.

The $50,000 threshold is indexed for inflation. The IRS is supposed to notify the taxpayer with Notice CP 508R when the debt is certified to the State Department.

There is a procedure for judicial review. I have spoken in the last couple of months with two U.S. tax court judges. Both report that they are not aware of any cases having been filed or procedures in place to handle the passport petitions. At the IRS liaison meeting on June 9, 2017, a speaker stated that it is more likely that the State Department will first deny renewal and new passports before it starts revoking existing passports. There is a concern that a U.S. citizen could be left stranded outside the United States.

continued, next page

Tax Tips . . .
from page 43

Fifty thousand dollars is not a particularly large number. Denial or revocation of a passport can significantly impact a client's ability to visit with family and conduct business outside the United States.

Practice tip: Be alert to fraud. Will fraudsters "issue" fake CP 508R forms in an effort to defraud a taxpayer?

Practice tip: It is very common for a federal tax lien to have been filed or a levy issued before the client seeks assistance. By that point the passport is at risk. In some cases, the notices are ignored as there is little for the IRS to seize. You may want to warn the client of the possible risk to the passport.

Private tax debt collectors—yet again

In late 2015, Section 32102 of the Fixing America's Surface Transportation (FAST) Act was put into law, requiring the IRS to use private debt collectors to recover delinquent tax debts.

This is at least the third time that the IRS has attempted the use of private debt collectors—this time it is required by law to do so. While many of us were hoping that implementation would be delayed (and the law repealed), the IRS has recently selected private debt collectors and the program is in the process of implementation. The intent is to allow private debt collectors to "chase" old, otherwise uncollectible accounts that the IRS has not been pursuing.

The IRS is supposed to notify taxpayers if a private debt collector is assigned to their case. Before starting the private collection process, the IRS and the collector will send these letters:

- First, the IRS will send a letter notifying the taxpayer that the IRS has assigned the case to a private debt collector.
- Second, after assignment and before contacting the taxpayer, the private debt collector will send a letter.

The continuing fear is that not only will the private collectors act improperly but that fraudsters will use this as another opportunity to defraud taxpayers. Private debt collectors do not have enforcement authority. Most clients do not know that.

Practice tip: In most cases there will be little benefit in engaging with the private debt collector. In addition, be particularly careful to avoid being duped by a fraudster.

Practice tip: The private debt collectors are not authorized to accept payments. All payments should be made payable to the U.S. Treasury, with the client's social security number, tax year and tax form written on the check. In the alternative, payment can be made on the IRS website, *irs.gov*.

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

Call for papers – *Florida Bar Journal*

Collett P. Small is the contact person for publications for the Executive Council of the Elder Law Section. Please email Collett at *csmall@small-collinslaw.com* for information on submitting elder law articles to The Florida Bar Journal for 2017-2018.

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.

Fair Hearings Reported

by Diana Coen Zolner

***Petitioner v. Agency for Health Care Administration (AHCA) and UnitedHealthcare*, Appeal Nos. 16F-01220 and 16F-03603 (July 21, 2016)**

This fair hearing covered two separate appeals by the same petitioner. The first issue was whether the denial of the petitioner's request for the ultra-underwear brand of extra absorbency disposable briefs was proper. The second issue was whether the denial of the petitioner's request for an additional seven hours per week of companion, homemaker and/or personal care services was proper. The burden of proof was assigned to the petitioner on both issues.

The petitioner is 78 years of age and resides with her daughter and granddaughter. The daughter is the petitioner's primary caregiver and representative in this matter. At all times during the proceedings, the petitioner was eligible for Medicaid. The daughter works 20 to 25 hours per week outside of the household.

The services approved for the petitioner through the Long Term Managed Care (LTMC) program include: 14 hours a week for personal care (2 hours/7 days/week), seven hours per week of homemaker services (1 hour/7 days/week) and seven hours per week of companion care (1 hour/7 days/week) in-home services. The petitioner was also approved through the LTMC program for disposable underwear (extra absorbency), personal changing wipes and disposable underpants.

In regard to the ultra-underwear, the petitioner submitted a request to UnitedHealthcare (UHC) for ultra-underwear (a brand of disposable underwear once provided by UHC), which was denied. The petitioner argued that she must be carried to the toilet to save on the amount of briefs used and that when she urinates in the disposable briefs provided, it burns her skin. The respondent argued that two cases of disposable extra absorbency briefs were provided to the petitioner monthly and that other brands of briefs could also be considered, but no request to try other brands was made.

The hearing officer denied the request for the ultra-underwear brand based on the conclusion that the request did not satisfy the definition of medically necessary. Florida Medicaid, which includes the LTMC program, covers only those services that are medically necessary per Fla. Stat. § 409.905 (4)(c). The definition of medically necessary can be found in Fla. Admin. Code R. 59G-1.010. Compelling evidence was not provided as to why the extra-absorbency disposable briefs provided by UHC were not sufficient, and no other brand of extra absorbency briefs were tried. The decision focuses solely on the type of brief and not the quantity. In denying the appeal, the hearing officer determined that the petitioner's request for the ultra-underwear brand failed to satisfy the conditions of medical necessity. More specifically, the hearing office found that the use of that particular brand did not meet the conditions that such use must be: 1) individualized, specific and consistent with diagnosis or treatment and not in excess of the patient's needs; 2) consistent with the generally accepted professional medial standards and not experimental; 3) reflective of the service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available; and 4) furnished in a manner not primarily intended for the convenience of the recipient or the caregiver.

In regard to the request for seven additional hours of in home care, the additional hours were to be divided between companion care, homemaker services and personal care services. However, the petitioner failed to establish whether a need existed on an equal basis for each service category, and it was unclear as to how each type of service would contribute to the need for the additional hours requested. To establish the need for additional hours, it is necessary to detail how those hours will be used and how those additional hours will satisfy an unmet need. Additionally, the need for additional hours must be medically necessary as defined by Fla. Admin. Code R. 59G-1.010. After reviewing the evidence, the hearing officer concluded that the petitioner did not demonstrate that an additional seven hours of care per week were medically necessary. In particular, the following conditions of medically necessary were not met: 1) individualized, specific and consistent with diagnosis or treatment and not in excess of the patient's needs; 2) consistent with the generally accepted professional medial standards, and not experimental; and 3) furnished in a manner not primarily intended for the convenience of the recipient or the caregiver.

***Petitioner v. Respondent*, Appeal Nos 16N-00023 (June 14, 2016)**

At issue in this appeal is whether or not the nursing facility's action to involuntarily discharge the petitioner is an appropriate action based on federal regulations in 42 C.F.R. § 483.12. The nursing home is seeking transfer and discharge of the petitioner because "her needs cannot be met" at the facility. The facility has the burden of proof to establish by clear and convincing evidence that the discharge is appropriate under the federal regulations found in 42 C.F.R. § 483.12. and Fla. Stat. § 400.0255.

A WanderGuard departure alert system was fitted to the petitioner's

wheelchair on recommendation from her doctor, and the device was to be checked by facility staff every shift. Several months later, the petitioner was given a new wheelchair, but the WanderGuard was not transferred to the new wheelchair. A few weeks later, the petitioner became confused and wandered to the door. A visitor opened the door and allowed the petitioner to get out of the facility. The petitioner's daughter asserts that if the WanderGuard had been transferred to the new wheelchair, the device would have triggered an alarm alerting the staff that the petitioner was outside the facility. Approximately one month later, the petitioner's doctor recommended that the petitioner be transferred to a safer nursing facility that could better meet her needs. As a result, the nursing facility issued a nursing home transfer and discharge notice, and the reason listed on the notice was "Your needs cannot be met in this facility." The notice was signed by the physician at the facility, and the explanation given to support the discharge was "psychiatry recommendation and for the patient's safety." The physician recommended that the petitioner be transferred to a secure facility.

The petitioner's daughter argued that the medication her mother was taking altered her behavior and that the discharge could be avoided if the facility would take the proper safety steps to fit her new wheelchair with a WanderGuard and treat her with medication that would not have such significant side effects. However, the respondent believes that the petitioner's needs would be better met elsewhere, at a secure facility where she can move around freely without the risk of exit. The respondent further argued that its facility has many doors and is not a locked facility, that the petitioner has attempted to leave the facility 25 times and that she continues to exhibit exit behaviors. The petitioner wants to stay at the facility because she has made friends there and has difficulty adjusting to new places. Furthermore, the petitioner's daughter contends that the petitioner does not have the physical strength to open doors on her own and is therefore not an exit risk without help.

Fla. Stat. § 400.0255(15) addresses resident transfer or discharge requirements and procedures. In sum, the statute states that when a discharge is initiated by the nursing home, it must be signed by the administrator or a facility employee authorized by the administrator to sign the notice of discharge or transfer. Furthermore, when the notice indicates a medical reason for transfer or discharge, it must either be signed by the resident's attending physician or the medical director at the facility. Federal regulations appearing at 42 C.F.R. § 483.12 state that a facility may not involuntarily discharge a Medicaid or Medicare patient unless the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility. The above cited authorities set forth the conditions that must be met for a nursing home to involuntarily discharge or transfer a resident, and all such conditions were met by the facility. Based on the above authorities, the hearing officer denied the appeal, finding that the nursing home had met its burden of proof in establishing that the petitioner's needs could not be met at the facility and therefore the discharge was proper.

***Petitioner v. Department of Children and Families (DCF)*, Appeal No. 16F-01140 (August 9, 2016)**

The petitioner's daughter applied for Hospice Medicaid in April 2015. She argues that she was asked to provide a copy of her power of attorney (POA), along with other verifications, and that the POA was provided. Department of Children and Families (DCF) records show that denial of the petitioner's application was mailed to the hospice and the petitioner's address in June 2015. When the denial was issued, the petitioner's daughter was notified that the petitioner was over the limit, which required the opening of a qualified income trust (QIT) account. However, the petitioner's daughter contends that she was not notified until December 2015 (six months after the denial) that her POA was not structured properly to give her the authority to open a QIT.

The petitioner's daughter consulted with an attorney to set up the QIT account in May 2015, but the attorney did not properly structure the POA to give her authority to create a QIT. (The petitioner did not initial the POA to give her daughter the authority to set up the QIT account.) The petitioner's daughter argues that DCF had a copy of the POA from May 2015 through December 2015, but did not notify her that the POA did not give her proper authority to set up a QIT. The petitioner's daughter contends that DCF had an opportunity in June 2015 to inform her that the POA was not properly structured. The petitioner's daughter made regular monthly payments into the QIT and questions why she was not informed prior to December 2015 that the POA was insufficient. An updated POA was signed by the petitioner and sent to DCF on April 26, 2016. The petitioner's daughter believes that DCF's legal team was responsible for informing her that the POA was insufficient.

DCF's representative explained that Hospice Medicaid cannot be approved if it cannot determine eligibility. DCF's representative explained that it needs to have a reason to forward the POA to its legal team and that the POA will not be forwarded for review without a copy of the QIT. Once the QIT is received, the POA is forwarded to the legal team for review. DCF acknowledges that the QIT was received in June 2015, but cannot explain why the POA and the QIT were not sent to the legal team for review until December 2015. Additionally, DCF contends that the case worker is not allowed to review a POA and inform a customer that it is

continued, next page

Fair Hearings . . .
from page 47

insufficient because that is considered to be practicing law. DCF explained that only its legal team can review a POA to determine if it is structured properly and legally sufficient. Upon receipt of the revised POA in April 2016, the legal team approved the petitioner's QIT and subsequently approved the petitioner's application for ICP Hospice Medicaid effective April 2016. However, the legal team was unable to approve the retroactive months of June 2015 through March 2016.

Based on Fla. Stat. § 709.2102(7)(9) (defines power of attorney), § 709.2105 (qualifications of an agent and the proper execution of a power of attorney), § 709.2106(1) (validity of a power of attorney) and § 709.2108(1) (when power of attorney is effective), the hearing officer concluded that the power of attorney in the petitioner's case became exercisable and valid on April 26, 2016, when it was properly signed by the petitioner. The petitioner's daughter argued that DCF should grant a hardship in the petitioner's case and approve the requested months as it failed to notify her from June 2015 through December 2015 that the POA was insufficient. The hearing officer concluded that DCF delayed its submission of the QIT to the legal department and recognized the daughter's argument. However, the hearing officer also concluded that Florida Statutes explained that the POA must be properly signed by the petitioner before her daughter would have the authority to conduct trust business in the state of Florida. Therefore, the POA signed by the petitioner did not become valid to create a QIT until April 26, 2016. It was the validity of the POA that allowed DCF's legal team to review and approve the QIT. As a result, the hearing officer could not conclude that DCF was in error for not approving hospice coverage for the requested months of June 2015 through March 2016, and the appeal was denied.

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

ABLE accounts . . .
from page 12

d. Ongoing family support – Three out-of-state brothers helping disabled sister in Florida to cover sister's housing expenses: condo HOA dues, property taxes, electric, etc. If the brothers each give $900 to their disabled sister in cash, she loses SSI eligibility and SSI-related Medicaid; if the brothers pay housing expenses directly, she still loses some of the SSI monthly check, which is reduced for in-kind support and maintenance (ISM) but capped by the presumed maximum value (PMV) rule, but is still a loss of about $3,000 tax free per year.

e. Saving for major purchases – Severely disabled § 1619b client earning wages of $50,000 per year but retaining Medicaid waiver benefits wants to save money as a down payment for a condo and for planned replacement of a $55,000 handicap-accessible van, without losing her Medicaid waiver benefits.

f. Alimony to be paid monthly to disabled wife is "unearned income," reducing nearly dollar-for-dollar the SSI check, but if the amount is under $1,166 and the alimony is paid to the ABLE account, she can access the money directly; doesn't interfere with SSI, SSI-related Medicaid, food stamps or other government benefits.

g. Child support for disabled child, paid by dad monthly up to $1,166 per month directly to ABLE account with mom accessing the funds directly without having to go through an expensive pooled or individual trustee to get a distribution; if not paid to an ABLE account, then two-thirds of the child support is subtracted from the SSI monthly check; with ABLE there is no subtraction from SSI.

11. ABLE Act's future – Proposed legislation since ABLE passed December 2014.

a. Broad bipartisan support for ABLE Act – There were 377 House and 74 Senate co-sponsors from both parties; 85 percent of all senators and congresspersons voted for final passage of the ABLE Act of December 2014.

b. Amendment in December 2015 passed with full bipartisan agreement to allow individuals to fund ABLE account in any state—prior law required account to be in the state where individual resided or a contracting state.

continued, page 50

Summary of selected case law

by Diane Zuckerman

Petition to determine beneficiaries/res judicata

Audrey A. Bryan v. Gary M. Fernald, as Administer Ad Litem, and Edward John, Appellees, 211 So. 3d. 333 (2nd DCA, 2017)

Issue: Whether a determination of a marriage as legally valid in a separate medical malpractice action is determinative of the issue in the probate proceeding. Does res judicata apply under these facts?

Audrey Bryan, on behalf of herself and other adult children of the decedent, and pursuant to Section 733.105, filed a petition to determine intestate beneficiaries in the probate action. The issue that arose was whether the surviving spouse Edward John was legally married to the decedent and thus entitled to one-half of her estate.

In a separate action, John alleged that the decedent died as a result of medical malpractice. His lawyers argued that the validity of his marriage to the decedent had already been determined in that lawsuit, and that the doctrine of res judicata should apply. The issue of the validity of the marriage had been asserted by the defendant doctor, and that court granted an order in a motion for partial summary judgment, finding "the person [John] married was the decedent."

A hearing on the petition to determine beneficiaries was held in the probate court in August 2015. The husband's lawyer argued that the issue had already been determined by a separate judge in the civil action and that the doctrine of res judicata applied. The appellant, on the other hand, argued that the adult children were not given the opportunity to dispute this issue in the medical negligence case. The probate court sided with the husband, and determined that John was legally married to the decedent and that all were beneficiaries of the estate.

On appeal, the elements of res judicata were analyzed by the Second District, which noted the four identity requirements. Citing the case of *Topps v. State,* 865 So. 2d.1253 (Fla. 2004), those identities are "(1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons or parties to the action; and (4) identity of the quality of the persons for or against whom the claim is made."

Applying this test to the instant case, the appellate court determined that the first two elements were not satisfied, noting that the medical malpractice action was a claim based on alleged negligence, whereas the probate case was to determine rightful beneficiaries. The court further found that the identity of party requirement was unmet as the sibling/children were not parties in the medical malpractice action and thus res judicata did not apply. Lastly, the court held that the order on motion for partial summary judgment in the medical malpractice case was not a final order. For these reasons, the case was reversed and remanded to the lower tribunal for further proceedings.

Practice tip: In situations when countering or asserting a defense of res judicata, be aware of and analyze whether the elements of identity are met between the two cases.

Appeal of non-final order/criteria for injunction orders

Janie Lerma-Fusco a/k/a Janie Lerma, as Personal Representative of the Estate of Franco Fusco a/k/a Frank Fusco, Appellant, v. Dennis Smith, individually and as Personal Representative of the Estate of Christian Alexander Smith and Tina Smith, Appellee, Case No. 5D16-1878 (5th DCA, 2017)

Issue 1: Whether an order setting aside an order striking a statement of claim as untimely is a final order and thus ripe for appeal.

Issue 2: Whether the order granting temporary injunction is legally sufficient.

In this case from our Fifth District, a personal representative moved to strike a statement of claim as untimely. The creditor was a holder of a default judgment, and asserted that they were a reasonably ascertainable creditor and therefore entitled to formal notice of the administration of the estate. The 90-day publication period had expired, and parties stipulated that the creditor had not received formal notice. At the hearing on the issue, the probate court determined that the claim was untimely and granted the motion to strike.

About four months later, the same creditor filed a motion to set aside the order striking the statement of claim. As grounds to support the motion, they argued they had newly discovered evidence, purporting to show the personal representative had actual knowledge of the default judgment prior the decedent's death, showing that they were indeed a reasonable ascertainable creditor entitled to formal notice. The probate court agreed and also granted the creditor's motion for temporary injunction to freeze the assets of the estate.

The personal representative appealed the two orders. As to the order setting aside the motion to strike, the Fifth District, citing Florida Rule of Appellate Procedure 9.170(b)(17), found that it did not finally determine the right or obligation of the personal representative. In fact, the lower court had determined that an evidentiary hearing would be needed on the factual issue of whether the creditor was entitled to formal notice. Therefore, the order setting aside the motion to strike the statement of claim was a non-appealable and non-final order, and jurisdiction was denied.

continued, next page

Summary of case law. . .

from page 49

As to the second order granting a temporary injunction to freeze the estate's assets, the court accepted jurisdiction. The appellate court reversed this order for failure to meet the legal tests. In order for a trial court to grant an injunction, the moving party is required to show irreparable harm, lack of an adequate remedy at law, a substantial likelihood of success on the merits and considerations of public interest. When such finding is made by the trial judge, then the procedural requirements of Fla. R. Civ. P. 1.610(c) apply. This rule requires an injunction order to "specify the reasons for entry and shall describe in reasonable detail the act or acts restrained without reference to a pleading or another document." The court found, and the nonmoving party conceded, that the injunction order did not meet the requirements of this rule.

Practice tip: When preparing injunction orders for the court to sign on behalf of your client, be aware of the rule requirements, draft the order carefully to comply with Fla. R. Civ. P. 1.610 (c) and anticipate and avoid an unnecessary and expensive appeal. Also, to avoid an unnecessary appeal, be reminded to do research or to consult with an experienced appellate lawyer as to whether your order is final and thus ripe for appeal.

Standing/trust beneficiary

John Adam Edwards and Brindley Kuiper, Appellants, v. Ryan Maxwell, Individually, Appellee, Case No. 1D16-2168 (1st DCA, 2017)

Issue: Whether a beneficiary of irrevocable trusts benefitting descendants has the legal standing to contest an adoption for lack of notice.

Ryan Maxwell was the only biological son and a beneficiary of three irrevocable trusts established by his great-great grandparents to provide for their descendants. In 2004, Maxwell's father adopted another son, Brindley Kuiper, with the effect of making him an eligible beneficiary under the irrevocable trusts.

In 2014, claiming he was unaware of the adoption, Maxwell filed a motion to set aside the adoption on the grounds that he was entitled to and failed to receive notice. He claimed he had a legal right to notice as an interested person, arguing the adoption depleted his share of the trusts' benefits. His motion was granted by the trial court and the appeal ensued.

In its analysis of the standing issue, the First District described Maxwell's interest in the trust as a contingent beneficiary, noting that he had no direct or immediate right to the trust funds and that the trustee decided to whom among the beneficiaries, and when and in what amount any disbursements would be made. As such, the court found he lacked an immediate and direct interest in the adoption and was not entitled to notice. The ruling was reversed and remanded with direction to reinstate the adoption.

Practice tip: This case limits a trust beneficiary's standing under this limited factual situation, and suggests it could be relied upon to challenge standing in similar or comparable situations.

Diane Zuckerman *is AV rated by Martindale-Hubbell. She received the BS degree in nursing from the University of South Florida and the JD from the University of Florida, Levin College of Law. Her education in nursing and law gives her unique insight into the interface between the two disciplines and helps her to be a knowledgeable practitioner. She is a member of the Elder Law and Real Property, Probate and Trust Law sections of The Florida Bar and the Hillsborough County Bar, and she is active in Kiwanis and the Tampa Bay Estate Planning Council.*

ABLE accounts . . .

from page 48

c. Three pending amendments.
   i. The ABLE to Work Act (HR 4795/S 2702) – To enable ABLE beneficiaries to save from their wages additional amounts in their 529A account and be eligible for the IRS saver's credit allowing an additional $11,700 annually to be added to the $14,000 cap for 529A from wages of designated beneficiary, for a total of $25,700.
   ii. The ABLE Financial Planning Act (HR 4794/S 2703) – Allows the rollover of a 529 higher education account to a 529A ABLE account.
   iii. The ABLE Age Adjustment Act (HR 4813/S 2704) – Increases the age of onset to 46, halfway to full retirement age of 66.

David Lillesand, Esq.*, is a partner of Lillesand, Wolasky, Waks & Hitchcock PL with offices in Miami and Tampa Bay, Fla. He is past chair of the ELS Special Needs Trust Committee and a frequent lecturer for NOSSCR, NAELA, ASNP and other state and national organizations on the topic of Social Security, SSI, Medicare and Medicaid, and the application of the Patient Protection and Affordable Care Act to the practice of social security and elder law. He and his partner, Marjorie Wolasky, are the authors of Chapter 17, "Special Needs Trusts," in the Florida Bar Lexis / Nexus publication Trust Administration in Florida, 8th edition.*

FAIR HEARINGS REPORTED

The Florida Bar Elder Law Section is proud to announce a new project – Indexing of the Fair Hearing Reports online. This project is sponsored by The Center for Special Needs Trust Administration Inc., *sntcenter.org,* 877/766-5331. Indexing will begin to appear online as the project proceeds until completion.

The reports are posted on the section's website at *eldersection.org* and are available to subscribers.

ANNUAL SUBSCRIPTION: $150 (#8060050)
July 1 - June 30

****

Fair Hearings Reported

ORDER FORM

NAME: _____ Bar #: _____

ADDRESS: _____

CITY/STATE/ZIP: _____

EMAIL ADDRESS: _____

PHONE: (_____) _____

METHOD OF PAYMENT:

❑ Check (in the amount of $150) payable to: "The Florida Bar Elder Law Section"

❑ Master Card ❑ VISA ❑ American Express

Card No.: _____ Expires:____/_____

Name of Cardholder: _____

Signature: _____

FAX TO: 850/561-9427

MAIL TO: The Florida Bar Elder Law Section, 651 East Jefferson Street, Tallahassee, FL 32399-2300

The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300

PRSRT-STD
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43