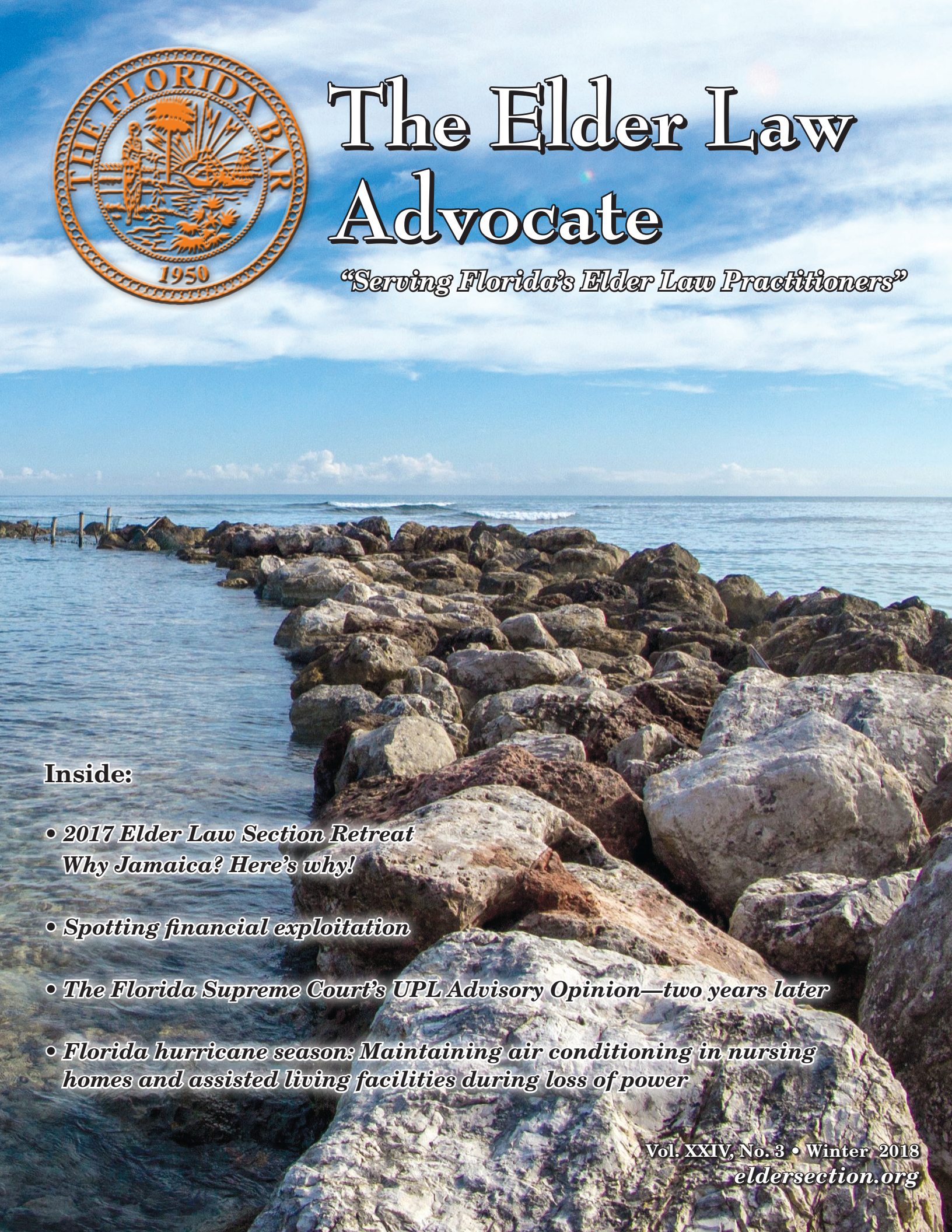
The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"



Inside:

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The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar

COVER ART

Water Landscape in Jamaica
by Ethan Finchum

1/2018

Contents:

The deadline for the SPRING 2018 EDITION: March 1, 2018. 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 Heather B. Samuels at *hsamuels@solkoff.com*, or call Chris Hargrett at 850/561-5625 for additional information.

Looking back, looking forward

Collett P. Small

Message from the chair

Having said good-bye to 2017, I would like to reflect on some of our section's activities. 2017 was an active year for our section, and we closed out the year with gusto. Here is a synopsis of what our section has been up to since our last newsletter:

In October, we held our section's retreat in Jamaica. This was our first out-of-country retreat, and the general feedback from the attendees has been positive. At our resort, we stayed in villas staffed with our own housekeeper, cook, and butler. We visited the Supreme Court and met with the island's first female chief justice, the Honorable Zaila Rowena McCalla, OJ, who gave our group great insights into the Jamaican legal system. While at the Supreme Court, we had an opportunity to meet with members of the Jamaican Bar and to observe the court in session. Brave members of our group climbed the world-famous Dunn's River Falls, visited local sites, experimented with local cuisine, attempted the local dialect, made new friends, and had a very *irie* time.

November was National Family Caregivers Month, and many of our members were involved in publicly creating awareness and appreciation about the important role of family caregivers. This included receiving proclamations from cities and counties across the state proclaiming November as Family Caregivers Month. I was honored to accept a proclamation from Mayor Frank Ortis of Pembroke Pines declaring November as Family Caregivers Month in the City of Pembroke Pines.

On November 10, I represented our section at The Florida Bar's Path to Inclusion Symposium, which was held in Orlando. The focus was on developing competencies aimed at creating a more inclusive legal profession and law practices in corporate law departments, law firms, and the public sector. I facilitated a small group discussion and shared with attendees from other sections our efforts to promote diversity and inclusion.

Also in November, several of our members who are a part of the Elder Law Run Club (yes, there is an Elder Law Run Club, and I would love to share with you how to join) participated in the AFELA fundraising run to raise money for the Joint Public Policy Task Force. Members of the run club had a choice of running a 5K, 10K, or half marathon in St. Augustine on November 12. Yours truly participated in the half marathon and achieved a new personal record of 2 hours and 29 minutes. The run club raised over $5,000 for the Joint Public Policy Task Force. The task force works daily on behalf of Florida's most vulnerable citizens and their families, as well as the practice of elder law, through advocacy, outreach, and education. The Joint Public Policy Task Force is a combined effort of the Academy of Florida Elder Law Attorneys and the Elder Law Section of The Florida Bar.

We are in the opening days of what promises to be a robust legislative session. The 2018 Legislative Session began earlier than usual, with regular session convening on January 9 and running through March 9. Our legislative and other substantive committees have been tracking several bills. Drumroll please … this year we are especially proud to be proposing our own legislation on exploitation. This bill seeks to obtain a 15-day injunction to temporarily freeze assets when misappropriation or exploitation is suspected. I would like to thank our members who worked diligently on this bill, especially our legislative co-chair, Shannon Miller, for all her hard work and dedication working with other sections of the Bar, and our lobbyist for seeing this through. Our section is tracking several bills of interest. If you are not already involved in a substantive committee, now is a great time to join as many of these bills are reviewed by our substantive committees before the section decides whether to take a position on proposed legislation.

One of my goals as section chair is to see more of our members participate in The Florida Bar's leadership track. As a section, we have been 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. I believe that our section is a section of rock stars, and I also believe it is time for us to share our talents outside our section. Applications for this year's Leadership Academy and committee appointments for The Florida Bar closed on January 16. It will be exciting to see which of our elder law colleagues will be participating in 2018.

Our section's flagship CLE event, The Essentials of Elder Law and Annual Update CLE was held January 11-13 at Portofino Resort in Orlando. Jason Waddell was program chair for this event. He, Sam Boone, and Marjorie Wolasky, co-chairs of the CLE committee, worked hard to select an impressive lineup of speakers and topics. Additionally, Jason and Jill Ginsberg of our sponsorship committee secured awesome sponsors for this three-day event. Please thank these hardworking members when you see them!

Session 2018: Elder exploitation bill would protect vulnerable adults

The 2018 Legislative Session is upon us. As discussed in previous updates, this year's session began in January rather than in March. With the earlier start date, the House and the Senate held committee meetings from October through December. Just as in previous sessions, we continue to actively review bills that have been filed and are meeting with legislators on key issues. We are also closely watching the preliminary budget discussions and forecasts. The following is an overview of Session 2018.

Elder exploitation

Recognizing that there is no mechanism for a vulnerable adult to quickly prevent assets from being dissipated without first hiring an attorney, the Joint Task Force and the Elder Law Section's Legislative Committee have been working with Senator Kathleen Passidomo (R-Collier County) and Representative Colleen Burton (R-Polk County) on a legislative remedy. In addition, we worked closely with RPPTL to resolve its concerns prior to the bill being filed. The following is a detailed summary of the legislation under consideration (for more information, please go to the legislative advocacy page—see below).

- The proposed change adds a piece of the puzzle that has been missing for elder protection, namely a quick and inexpensive mechanism for the temporary *ex parte* freezing of assets to prevent exploiters from continuing to prey upon our most vulnerable citizens.
- There must be sufficient and reasonable cause to believe that a vulnerable adult is in imminent danger of being exploited.
- The cause of action would be initiated by a sworn petition filed in circuit court by the vulnerable adult, that person's guardian, or by a person or an organization acting on behalf of the person or guardian with appropriate consent.
- The legislation recognizes that many "vulnerable adults" may have guardians or need guardians, or even that a guardian may be the respondent. As such, if the petitioner needs an emergency temporary guardian and protection against exploitation, both petitions may be filed simultaneously.

Capitol Update

by Brian Jogerst

- If the petitioner already has a guardian, then assets held by the guardian may only be frozen by the court overseeing the guardianship proceeding.
- A key component is that representation by an attorney is not required and no filing fee is required.
- To address concerns that someone could abuse this new procedure, "actual damages" may be assessed where a petition was filed "without substantial fact or legal support."
- The clerk must send a copy of the filed petition to Adult Protective Services, which is instructed to treat it as a report of elder abuse, neglect, or exploitation (triggering its own investigation) and to send the court copies of any APS investigations involving the petitioner within 24 hours.
- A nonexclusive list of relevant factors is added for consideration of exploitation.
- The *most* salient protection from asset depletion is the ability to seek temporary, emergency *ex parte* relief for immediate and present danger of exploitation, pending a full hearing. The court's authority on temporary injunctions is expanded to allow for the orders specific to exploitation.
- A temporary injunction remains in effect for 15 days.
  - During this time, the petitioner could seek help to address the problem, including less restrictive alternatives to guardianship such as an appropriate durable power of attorney.
  - A temporary injunction would also allow for filing for emergency guardianship if needed, civil action, or a criminal complaint without fear that remaining assets would be accessed.
  - At the end of the temporary injunction, if granted, a hearing would be required, with service of notice on the respondent, to allow for a permanent injunction. The court also has the authority for continued restraint of the respondent from exploitation of the vulnerable adult and/or to direct the assets under temporary freeze to be returned to the vulnerable adult or to remain frozen until ownership can be determined.

We are pleased that both Representative Burton and Senator Passidomo understand the problem we are trying to solve and are grateful for their willingness to file the bill.

Other bills of interest

In addition to the bill outlined above, below is a list of other bills we have reviewed, and we have also held a series of conference calls and meetings with interested groups to discuss the issues and work to resolve our concerns:

Guardianship – Senate Bill 1002 by Senator Passidomo provides authority to the clerks for additional and non-court approved random audits, and permits *ex parte* communications between the clerk and the court. We oppose this bill largely on the *ex parte*

communications provision.

Vulnerable adults/security dealers – Senate Bill 662 by Senator Kelli Stargel (R-Polk County) is designed to give financial institutions the ability to put a temporary hold on a transaction if they suspect exploitation. While we support the overarching desire to protect vulnerable adults, we are concerned with specific provisions included in the bill and are working with the security dealers to resolve our concerns.

Remote notarization – Senate Bill 1042 by Senator Jeff Brandes (R-Pinellas County) and House Bill 771 by Rep. James Grant (R-Hillsborough County) create a remote notarization process. While not the electronic wills bill from the 2017 Session, we are concerned that sufficient safeguards are not included to protect vulnerable adults and are also concerned about remote notarization for durable powers of attorney.

Budget

Prior to the 2017 Legislative Session, legislators had a small budget surplus but a projected $1.3 billion shortfall for the 2018 Session. To address the budget gap, the Legislature made significant budget reductions to the health and human services budget, including more than $600 million in reductions to hospitals. Many hoped the reductions made in 2017 would prevent additional reductions in 2018 … but then came Irma.

Prior to the 2108 Session, budget forecasters again projected a small surplus, but the fiscal impact of Hurricane Irma changed those forecasts—and budget reductions may again be proposed by the House and the Senate. The two chambers will likely release their initial budget proposals in mid to late January, and additional updates will be provided.

With regard to legislative issues, typically more than 3,000 bills are filed each year, and the Legislative Committee, along with the ELS substantive committees, continue to review the bills that are filed, and we have been actively working on the bill that we asked to be filed for this legislative session to address elder exploitation.

Legislative advocacy website

For more details on the bills listed above, as well as copies of white papers (including the elder exploitation bill) and other bills we are tracking, please go to *https://afela.org/legislative-advocacy/*.

Please check the website often because we will be updating throughout the session.

Legislative Committee

As noted above, the Task Force, the ELS Legislative Committee, and other ELS substantive committees are actively reviewing all bills that are filed and will provide comments to the sponsors. The Task Force meets every Thursday, and the ELS Legislative Committee meets every Friday during session. If you want to participate on a substantive committee and also review/comment on the bills that are filed, please contact the co-chairs of the ELS Legislative Committee:

- Bill Johnson
wjohnson@floridaelderlaw.net
- Shannon Miller
shannon@millerelderlawfirm.com

We have enjoyed success on legislative issues by working with legislators and providing feedback to them, as well as by testifying at committee hearings. We are grateful for the grassroots support we have received and for the difference it makes when working with legislators.

You can also help by working with your local legislators and being a local resource to them. If you do not know your legislators, we remain willing to help facilitate an introduction with these legislators and their staff.

Brian Jogerst *is the president of BH & Associates, a Tallahassee-based governmental consulting firm under contract to the Academy of Florida Elder Law Attorneys for lobbying and governmental relations services in the State Capitol.*

Spotting financial exploitation

by Ellen Cheek and David A. Weintraub

"I know it when I see it." These words were made famous in Justice Potter Stewart's concurrence in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). Justice Stewart was writing about obscenity and how to identify it. But is exploitation of the elderly as easy to spot? Sometimes yes, other times no.

We have all seen the obvious, egregious cases—an adult child misappropriating a parent's funds is one common situation. Less obvious, but often just as serious, is the financial exploitation of the senior as a consumer. Some of the documents in dubious transactions can contain red flags that not only help identify a predatory situation but also might give an advocate leverage for resolution.

For example, many senior consumers fall prey to home solicitors who sell any number of goods and services, including home security systems, solar systems, air conditioning, and other significant home improvements. Home solicitations are governed by Florida Statute, and while many are familiar with the three-day right to cancel, the requirement in Section 501.022, Florida Statutes, that home solicitors apply for and receive permits in advance, is much less well known. Knowing that a home solicitor has not filed an application for this permit with the clerk of the circuit court in the county in which the solicitation has taken place may be useful in evaluating a potential exploitation case and a possible negotiated resolution.

Similarly, many consumer transactions, possibly including home solicitations, involve a promissory note in which the homeowner agrees to borrow money from a third-party lender. Pursuant to Section 201.08, Florida Statutes, documentary stamps are required for most promissory notes signed in this state. While documentary stamps are often associated with a real estate transaction, they are equally applicable to auto loans, home improvement loans, and most other debt evidenced by a promissory note. Discovering that the documentary stamp tax was never paid to the Florida Department of Revenue may be a red flag for predatory behavior. Although it may be difficult to determine whether the documentary stamp tax was actually paid (the Department of Revenue will not tell you), an advocate might consider writing a letter to the putative wrongdoer, asking for evidence of the tax having been paid and attaching copies of the relevant statutes. This approach may be one way to facilitate a recovery in cases where a senior consumer has been victimized.

While spotting exploitation may not be as easy as spotting obscenity, peeling back the various layers of the transaction may bear unexpected fruit.

***Ellen Cheek, Esq.**, is the assistant manager of the Florida Senior Legal Helpline and practices elder law at Bay Area Legal Services, Inc., in Tampa, Fla. She is co-chair of the ELS Abuse, Neglect & Exploitation Committee.*

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

The Florida Supreme Court's UPL advisory opinion—three years later An update from the UPL committee

by John R. Frazier and Leonard E. Mondschein

It has been three years since the Florida Supreme Court approved the UPL advisory opinion, on Jan. 15, 2015. Since that time, the Elder Law Section's UPL Committee has received fewer reports that non-attorney Medicaid planners are allegedly engaging in the unlicensed practice of law (UPL). Our committee has also received feedback that most, if not all, non-attorney Medicaid planners are now "affiliated with" or "working with" a Florida licensed attorney. However, the UPL Committee still receives reports that some non-attorney Medicaid planners may be doing all of the communication with the Medicaid client.

In one instance, there was a recent report that a non-attorney Medicaid planner refused to tell the client the name of the attorney involved in the case. This indicates that the attorney had no direct relationship with the client.

In another case it was reported by a client that a person acting as a paralegal was referred to the client by someone at a nursing home. This individual, who claimed to be acting for an attorney as stated on her business card, signed up the client, planned all strategies, and presented all documents to be signed—without the attorney ever meeting or speaking to the client. This same so-called paralegal was previously employed by a large Medicaid planning firm and only recently added the attorney's name to her business card.

There has also been a report that an attorney Medicaid planner was successfully sued, and a judgment issued against the non-attorney, in a case involving a large personal services contract payment made to the non-attorney Medicaid planner.

As an important reminder, The Florida Bar's UPL investigative process is "entirely complaint driven," under Bar Rule 10-5.1 Complaint Processing, which states:

10-5.1 Complaint Processing

(a) Complaints. All complaints alleging unlicensed practice of law, except those initiated by The Florida Bar, shall be in writing and signed by the complainant. The complaint shall contain a statement providing that:

Under penalties of perjury, I declare that I have read the foregoing document and that to the best of my knowledge and belief the facts stated in it are true.

Due to the complaint-driven nature of The Florida Bar's UPL investigative process, it is critically important for clients who have been injured by UPL to be encouraged to file UPL complaints with The Florida Bar.

If you have any questions regarding UPL in the Medicaid planning process, please contact John Frazier or Leonard Mondschein, ELS UPL committee co-chairs.

***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). He can be reached at john@attypip.com.*

***Leonard E. Mondschein, JD, LLM, CELA, CAP**, is a shareholder in The Elder Law Center of Mondschein and Mondschein PA with offices in Miami and Aventura, Fla. He is board certified by The Florida Bar in elder law and wills, trusts, and estates, and has served as chair of the Elder Law Section of The Florida Bar. He is a Certified Elder Law Attorney (CELA) by the National Elder Law Foundation and is a member of the Council of Advanced Practitioners (CAP). He can be reached at lenlaw1@aol.com.*

Florida hurricane season: Maintaining air conditioning in nursing homes and assisted living facilities during loss of power

by Christian Horde

Hurricane Irma left many in Florida without power, including some of Florida's most vulnerable residents: those living in nursing homes and assisted living facilities. Loss of power to these facilities put many of their residents at risk. Even when the facilities had back-up power for some utilities, many times air conditioning remained unpowered.

Following the 14 heat-related deaths[1] at The Rehabilitation Center at Hollywood Hills, Florida, Governor Rick Scott directed the Florida Agency for Health Care Administration (AHCA) and the Florida Department of Elder Affairs (DOEA) to issue emergency rules[2] requiring the installation of air conditioning generators at nursing homes and assisted living facilities. The emergency rules called for "sufficient equipment and resources to ensure that the ambient temperature […] will be maintained at or below 80 degrees Fahrenheit within the facilities for a minimum of ninety-six (96) hours in the event of the loss of electrical power."[3] Given Florida's hurricane history, why was there not a rule like this already in place?

In January 2006, shortly after Hurricane Wilma, former State Representative Dan Gelber fronted a bill that would have required some, but not all, nursing homes to have generators capable of cooling their facilities. There was resistance from the long-term care industry due to the costs of compliance, so a compromise bill was introduced that included reimbursement for approximately half the cost of installing the generators. The bill made it through the House of Representatives but did not make it past the Senate.[4]

Governor Scott's emergency rules were immediately met with both approval and pushback. Three petitions challenging the emergency rules were filed with Florida's Division of Administrative Hearings by the Florida Assisted Living Association,[5] LeadingAge Florida,[6] and Florida Argentum.[7] Administrative Law Judge Garnett Chisenhall was assigned to the consolidated case.

The petitioners questioned: (1) whether there was procedural protection given by the Florida Statutes, the Florida Constitution, or the United States Constitution; (2) whether the emergency rules took the actions necessary to protect public interest under Fla. Stat. § 120.54(4); and (3) whether the rules were an invalid exercise of legislative authority under Fla. Stat. § 120.52(8). Overall, it was requested in the petitioners' proposed final orders that Judge Chisenhall hold the emergency rules as an invalid exercise of delegated legislative authority. AHCA and DOEA proposed a final order stating the emergency rules are valid and comply with all requisites of Fla. Stat. §§ 120.52(8) and 120.54.

There were compelling arguments on both sides, but all should agree that our state needs to improve the emergency preparedness of Florida's nursing homes and assisted living facilities, especially since their client base continues to grow. Florida is first in the nation for the 65-and-over population. The senior population alone is expected to increase to 7.1 million by 2030. More than 1.6 million Floridians are over age 75, and the 100-and-older age group is the fastest-growing group by percentage.[8] Given these trends, the population growth in nursing homes and assisted living facilities can be expected to keep pace.

On Sept. 20, 2017, just days after Hurricane Irma, Kathryn Hyer, PhD, MPP, professor and director with the Florida Policy Exchange Center on Aging at the University of South Florida, gave testimony before the U.S. Senate Special Committee on Aging about the significant difference in the rates of hospitalization and death between nursing home residents who sheltered in place versus those who were evacuated. Dr. Hyer testified that "the very act of evacuation prior to the storm increased the probability of death at 90 days by 2.7-5.3% and increased the risk of hospitalization by 1.8-8.3 %, independent of all other factors. […] evacuation proved to be cumulatively more dangerous than sheltering in place."[9] Given these findings and the tragic, preventable deaths at Hollywood Hills, facilities and their residents should favor sheltering in place rather than evacuating. Therefore, it is imperative that facilities are equipped with back-up generators to provide air conditioning and other essential services during power outages.

On Oct. 27, 2017, Judge Chisenhall issued a final order stating that "Emergency Rules 58AER17-1 and 59AER17-1 of the Florida Administrative Code are invalid exercises of delegated legislative authority as defined in section 120.52(8), Florida Statutes […]." The main reason cited was that AHCA and DOEA failed to demonstrate the existence of an immediate danger. The case is on appeal.

This case looked at what constitutes an immediate danger for the valid exercise of Fla. Stat. § 120.54(4). Emergency rules skip the normal time-consuming rulemaking process

with the notion that public welfare is at stake and immediate action is needed to provide protection. Judge Chisenhall agreed with the petitioners that the singular tragedy at Hollywood Hills did not rise to the level of immediate danger. While Hurricane Irma is no longer a threat, the threat of hurricane season is new every year. If more facilities had experienced what happened at Hollywood Hills, would the decision regarding immediate danger have been different?

Proactive law-making is needed rather than a reactive response. Non-emergency rules and legislative bills are already in progress even if the respondents lose on appeal. The hurricane season has ended, but the danger of another tragedy like the one at Hollywood Hills persists without a uniform rule on maintaining air conditioning in these facilities. The lives of Florida's most vulnerable residents are truly at stake.

Endnotes

1 As of November 1, 2017.

2 Pursuant to Fla. Stat. § 120.54(4).

3 43 Fla. Admin. Wkly. 180 (September 18, 2017) Sections 58AER17-1 and 59AER17-1.

4 Fla. H. 645 (January 9, 2006). Florida Legislature Regular Session 2006 History of House Bills Page 293. http://www.leg.state.fl.us/data/session/2006/citator/final/hsehist.pdf (accessed October 31, 2017).

5 Florida Assisted Living Association (FALA) is a professional organization representing the owners and operators of assisted living facilities and adult family care homes in the state of Florida.

6 LeadingAge Florida is a professional organization comprising approximately 350 elder care organizations.

7 Florida Argentum is a professional organization that represents companies that operate professionally managed senior living communities, including independent living, assisted living, and memory care communities.

8 http://elderaffairs.state.fl.us/doea/pubs/pubs/DOEA_Fact_Sheet.pdf (accessed October 31, 2017).

9 http://trainingonaging.usf.edu/pdf_files/hyertestimony2017.mp4 (accessed October 31, 2017); https://www.aging.senate.gov/hearings/disaster-preparedness-and-response-the-special-needs-of-older-americans (accessed October 31, 2017).

***Christian Horde, Esq.**, is an associate attorney at The Elder Law Center of Kirson & Fuller in Orlando, Fla. He received the JD from Stetson University College of Law and is currently working toward the LLM in elder law at Stetson.*

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.

SECTION SCENE

2017 Elder Law Section Retreat

Why Jamaica? Here's why!

The group is ready to visit the Supreme Court of Jamaica: David Hook, Victoria Heuler, Georgia Robinson, Debra Slater, Collett Small, John Clardy, Ellen Morris, Travis Finchum, and Joan Hook. Photo by Ethan Finchum

The Elder Law Section meets in Jamaica.

The original waterwheel at the Sugar Mill serves as a background for Jill Ginsberg, Victoria Hueler, Debra Slater, and Collett Small.

Elder Law Section retreat participants climb Dunn's River Falls in Ochos Rios, Jamaica.

Lillian and Ethan Finchum show us some Jamaican love!

Photos by Jill R. Ginsberg or Travis D. Finchum unless otherwise noted

Section Scene

Day trip to Ocho Rios with the crew

Dinner at the famous Sugar Mill Restaurant at the Half Moon Resort; pictured here are Chris Hargrett, Steven Hitchcock, Audrey Posey, Buddy Evans, Kara Evans, Debra Slater, and Victoria Heuler.

When in Jamaica, eat jerk chicken like the locals at Scotchies Restaurant! Pictured at left are Steve Hitchcock, Aubrey Posey, Buddy and Kara Evans, Ethan Finchum, and Lillian Finchum; pictured at right are Jill Ginsberg, Debra Slater, Collett Small, Chris Hargrett, and Ricky Libbert.

Photos by Jill R. Ginsberg or Travis D. Finchum

2017 Elder Law Section Retreat
Why Jamaica? Here's why!

by Jill R. Ginsberg

When Collett Small, chair of the Elder Law Section of The Florida Bar, does something, she does it right. That's why our annual retreat, held Oct. 5-8, 2017, at the Half Moon Resort in Montego Bay, Jamaica, was so special. A wonderful time was had by all.

Why Jamaica, you ask? Well, that is where it all started. Jamaica is made up of 14 parishes, and Collett is from St. Ann Parish. What better way to show us her childhood home than a trip to her birth country?

The Zamora family enjoying the resort; Photo by Leroy Cammock

After landing at Sangster International Airport, we enjoyed the hospitality of the Half Moon Resort, a 197-room hotel (don't forget the 39 villas) with a golf course. Whisked away to the beautiful resort, we were 40 strong: lawyers, families, and children. Of course, Collett arranged for our stay to be all-inclusive. What a great way to enjoy the resort and all it has to offer without worrying about fees, making the retreat quite wallet friendly.

The 400-acre resort features two miles of beach front, an award-winning spa, an 18-hole par 72 golf course, tennis courts, and an equestrian center with 28 horses. There are also several restaurants, 50-plus pools, and a panoramic view of the horizon. As much as we got to enjoy the resort, our chair planned an action-packed weekend full of trips, food, and fun.

We started the weekend with an executive session, but the highlight of the day was a gourmet meal at the Sugar Mill Restaurant, one of the finest on the island. The restaurant is located on the former Running Gut Estate on the Rose Hall Sugar Plantation dating back to 1676. It features unique twists on Jamaican cuisine and 50-year-old Appleton Estate rum. After a carefully curated meal created especially for us, we retreated to our villas and rooms in our specially assigned golf carts.

Our rooms were located in beautiful houses with four-to-six rooms each. Our house hosted Debra Slater, Collett Small, Victoria Hueler, Kara Evans and her husband, Buddy, and yours truly. Each house included butlers, chefs, maids, and house staff. These fantastic people cooked special meals for all of us and were on call always, magically appearing with towels or whatever else you needed at the exact moment you needed it. In fact, on our last day, Johnny and Ruby cooked us a wonderful Jamaican breakfast of ackee and saltfish. Ackee is a fruit that when cooked has the flavor and consistency of scrambled eggs, so ackee and saltfish is like eggs and lox. What a special touch reflecting the fine level of service at this resort!

The house also had a living room for all of us to enjoy and a private pool just for our house. It was one of the cleanest pools I've ever seen. The resort offered a full bar all day as well as all the snacks and food you wanted whenever you wanted them. Each house had its own golf cart for the exclusive use of the guests of that house during their stay. What a great way to travel all over the resort!

On the second day, we took an amazing trip across the island to Kingston to see the Supreme Court. The courts in Jamaica are very different from our own. In fact, as elder law attorneys, it was interesting to note that there are no parallel guardianship proceedings in Jamaica. We attended a two-hour meeting with the chief justice, for which we received CLE credits. We also received a tour of the Supreme Court and had the opportunity to sit in on a few hearings. After leaving the Supreme Court, we headed to uptown Kingston, where we had lunch at Usain Bolt's Tracks and Records restaurant.

That evening after dining at the Seagrape Restaurant centrally located at the hotel, we were treated to exciting entertainment including music, a fire breather, and fabulous dancers. Late night, the lobby at Half Moon proved to be a great place to gather. Always fun to talk and drink, especially with the esteemed Zamora family!

Next day, a fantastic trip to Dunn's River Falls proved a family favorite. With entire families in tow, we took a bus to the site and then climbed the falls with a guide. Complete with our own videographer, we climbed the

cold, flowing river all the way to the top, with Travis Finchum and his daughter, Lilly (Lillian), watching and filming us all the way. While the water was cold, a "cool" time was had by all.

All trip long, we heard about a local restaurant chain named Scotchies. Famous for their jerk chicken, these three restaurants in Jamaica are top ranked on TripAdvisor. The recipe and technique are the same at every branch. So, fresh from our trip up the falls, we went to have Scotchies, the best jerk ever. Chicken, pork, corn, soup—lots of really good food. Everything is in foil, and you order and eat on wood tables under a tiki hut. After a game of Jenga with Red Stripe beer bottles, we headed off to our next awesome destination, our home base.

We were finally able to spend some time at the resort, where we swam in the several pools located on the grounds. One of the pools has a swim-up bar and tables in the pool so you can even work from the pool (not that you are thinking about work there). After attempting laps in one of the longest lap pools I've ever seen, and giving up, it was off to riding bicycles, walking the resort, and checking out the view. Of course, no visit to the resort is complete without shopping in the many shops located on the resort's grounds. You must bring back Jamaican coffee; the Blue Mountain variety makes a great gift.

The next morning, after a fantastic going away breakfast, we took one last walk on the beach to remember our trip. So sad to leave, but looking forward to returning someday with my family. See you soon back in Jamaica, mon.

ELS Retreat through the eyes of a teen

Ethan and Travis Finchum; Photo by Kiersten Finchum

Chief Justice Zaila McCalla of the Supreme Court of Jamaica meets with ELS members. Photo by Ethan Finchum

Ethan Finchum, the 16-year-old son of ELS member and special needs trust co-chairman Travis Finchum, accompanied his dad to the ELS Retreat in Jamaica. He wrote the following impressions about the event as part of his American government class at St. Petersburg College.

Civic Engagement: Jamaican Supreme Court

From the weekend of October 5-8, I went to Jamaica for my dad's work. My dad is an elder law and special needs law attorney. We went to the Supreme Court there to meet with the Chief Supreme Court Justice, Zaila McCalla, to discuss their policies on elder law and special needs law. I sat and listened to their hour and a half discussion on Jamaica's policy regarding wills, trusts, probate, asset distribution, powers of attorney and the process of becoming a lawyer in Jamaica.

I found out that Jamaica is a parliamentary democracy under a constitutional monarchy, which is much similar to Britain, their previous mother country. They have a unitary system where the power flows down from the top of the federal government, down to the state level, then to the local level. I also found out that their Supreme Court is NOT "supreme"; their Court of Appeals is a higher court and is actually held in Britain. Overall, I learned a lot about the Jamaican government and had an amazing time touring its Supreme Court.

SECTION NEWS

Mark your calendar!

May 10, 2018
Special Needs Trust CLE
(venue and time TBA)
Tampa, Florida

June 13-16, 2018
Annual Florida Bar Convention
Hilton Orlando Bonnet Creek
Orlando, Florida

Elder Law Section Events During Annual Convention

June 15, 2018 • 8 a.m.-12 noon
Medicaid CLE

June 15, 2018 • 2 p.m.-4 p.m.
Executive Council Meeting & Awards Reception

October 3-7, 2018
Elder Law Section Retreat
Washington Marriott at Metro Center
Washington, D.C.

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*.

THE FLORIDA BAR
ELDER LAW SECTION

Committees keep you current on practice issues

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

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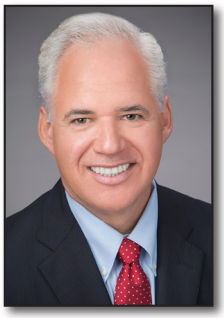
MEMBER NEWS



Alex Cuello receives pro bono award

Alex Cuello, Esq., of Coral Gables received the 2017 Pro Bono Award of the Year from the Foundation for Indigent Guardianships and the Florida Department of Elder Affairs, Office of Public and Professional Guardians for his contribution of legal expertise providing support, training, and legal services on behalf of public guardians and the clients they serve who are indigent and cognitively disabled.

Cuello is the principal shareholder of the Law Office of Alex Cuello PA in Miami. He has been admitted to practice law in Florida since 1996. He received the BA from Florida International University, law degree from St. Thomas University and Master of Laws degree in elder law from Stetson University.

Board certified by The Florida Bar as a specialist in elder law, Cuello focuses his practice on this area of the law, with an emphasis in probate administration and litigation, guardianship administration and litigation, estate planning, and special needs planning.He is a member of the Elder Law Board Certification Committee, and teaches the court-approved Professional Guardian and Family Guardianship courses. Cuello is AV rated by Martindale-Hubbell. You may contact Mr. Cuello by telephone at 305/567-1710 or email at *ac440@bellsouth.net* and visit his website, *www.cuellolaw.com.*

Scott Solkoff publishes practice guide

Scott M. Solkoff, Esq., of Solkoff Legal PA in Delray Beach has completed the 17th edition of the *Florida Elder Law Practice Guide* for Thomson Reuters Publishing. The 1,000-page guide is the leading text, written for lawyers, on representing the elderly and people with disabilities.

Solkoff is a Florida Bar board certified specialist in elder law. His law firm exclusively represents the elderly, people with disabilities, and their caregivers.

Solkoff has been elected a Fellow of the prestigious American College of Trusts and Estate Counsel (ACTEC). He has served as chair of the Elder Law Section, as president of the Academy of Florida Elder Law Attorneys, and as a director of both the Florida State Guardianship Association and the National Academy of Elder Law Attorneys. He is AV rated by Martindale-Hubbell representing the highest standard of practice in the legal community. He has also been chosen to Florida Super Lawyers annually since 2005.

PRACTICE MANAGEMENT

Is law practice strategic marketing a daily obligation?

by Audrey J. Ehrhardt

Your law practice needs key exposure in your community, on major search engines, and on digital platforms. This means strategic marketing is a daily obligation. You need to be frequently publishing, commenting, and sharing your message with your local audience and those who are searching for answers in your community. You want to be influencing your local community at least once each business day.

Research shows the more you engage, the more you increase your opportunities to be in front of your audience answering their questions when they ask them. Unfortunately, we also have research that tells us if you're not actively participating on social media each week but have business accounts set up, you can significantly hurt your rankings. You don't want to spend all this time, effort, and money to get your message out there only to have an off week and not be able to reach your audience.

How do you stay consistently strategic? How do you make sure your law practice's business accounts influence your community? After all, you are busy practicing law. Can you do it, and do it well? You most certainly can. In this article, we describe four of our best practices that we share with our clients who want to handle their digital marketing efforts themselves and achieve maximum impact to increase their exposure, revenue, and profitability.

1. Create a strategic marketing plan. Digital marketing must be a part of your overall law practice strategic marketing campaign. You need a plan with objectives, timelines, and tactics for you to implement and follow. What do you need to focus on each month? How will you answer questions? How will you draw people in? It comes down to planning each component in your plan for your firm including messaging, assets, visuals, and educational information that will most influence your audience.

2. Learn when your audience is listening. There is a significant amount of research devoted to finding out when your audience is actually listening to your digital campaigns. Tools such as Google Analytics, Facebook, and Twitter reporting and other key insight reports will inform you on the who, what, where, and when it comes to demographic on your accounts. For example, if no one is interacting with your website or your social media accounts at seven in the morning, that is not going to be the time you want to send out your campaigns. Although it may be what's most convenient for you, the maximum number of people won't see it when it is released.

3. Listen and respond. Marketing is all about the conversation; being there when your potential clients, current clients, and professional network need your help. You don't want to start a conversation and not finish it. Think of it this way: If someone called your office, would you want to pick up the phone and answer? Yes! The same applies to your digital marketing strategy. You need to be listening and responding in a meaningful way when your audience interacts with you.

4. Use publishing tools. Even when you have a full-time marketer on your team, it may be hard for you to find time to meaningfully run your digital campaigns each day. After all, you're dealing with clients, getting new work in the door, and managing your employees. Publishing tools like Buffer, HootSuite, Agora Pulse, and CoSchedule are designed with the busy business owner in mind. With more than 50 social media management programming tools available right now, be sure to pick the one that best fits the needs of your ecosystem.

To be competitive in your digital marketing strategy, you need to be creating custom content a minimum of three days a week and publishing it across digital media platforms. Don't wait to get strategic in your law practice marketing and keep your firm moving forward.

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* ***www.practice42.com.***

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Mamma mia, what's an MMMNA?

The tale: A very panicked elderly gentleman comes to your office. His wife has been placed into a nursing home, and the staff has advised him that he must apply for Medicaid. They also say he will be required to pay the nursing home all of his wife's income less $105. He is devastated because it takes both his and his wife's income to pay their expenses. Will he lose his home?

The tip: It is against public policy, not to mention federal regulations, to require an individual to pay so much of his or her income to a nursing that the community spouse becomes impoverished (see 42 USC s. 1396r-5(d) and 42 CFR 435.725(a) through (f)). Under the Medicaid spousal impoverishment provisions, a certain amount of income belonging to the spouse in the institution can be set aside for the community spouse's use. This means that a client like the one sitting in your office could receive some of his institutionalized spouse's income. This is called the community spouse income allowance (CSIA).

The CSIA is calculated by a formula that goes as follows: The state's minimum monthly maintenance needs allowance (MMMNA) plus the community spouse's excess shelter costs minus the community spouse's total gross income. The number is capped by the maximum monthly maintenance needs allowance.

What are these numbers, and where do you find them? 42 USC s. 1396r-5(d)(3) defines the MMMNA as 150% of the income official poverty line for a family of two. Section 1396r-5(d)(4) outlines the excess shelter allowance as the sum of the community spouse's expenses for rent or mortgage, taxes, insurance, monthly condominium maintenance, or homeowners association fees plus the standard utility allowance (but only to the extent that this number exceeds 30% of the state income allowance). The official poverty line is published each year in the Federal Register and can be found on any number of websites, but the MMMNA, the excess shelter standard, and the income allowance can all be found in Appendix A-1 of the ESS policy manual. For 2017, the MMMNA was $2,030, and the maximum was $3,023; the shelter standard was $338, and the income allowance was $2,205.

Tips & Tales

by Kara Evans

Let's run some numbers for your client.

The excess shelter costs must be calculated first. Follow the steps in ESS Manual § 2640.0119.04.

Rent or mortgage	$1,400.00
Property taxes	$100.00
Homeowner's or renter's insurance	$25.00
HOA fees	$100.00
Standard utility allowance	$338.00
Less 30% of state income allowance	($661.50)
Total excess shelter costs	$1,310.50

Next figure the CSIA.
Follow the steps in ESS Manual § 2640.0119.03.

State MMMNA	$2,030.00
Excess shelter costs from above	$1,310.50
Less community spouse gross income	($2,336.90)
Tentative total income allowance	$1,003.60

By the foregoing calculation, the CSIA should be $1,003.60; however, do not forget that there is a cap on the CSIA. The calculated $1,003.60 plus your client's income of $2,336.90 equals $3,340.50, which exceeds the cap of $3,023 by $317.50, so your client will receive a CSIA of $686.10. Remember that the community spouse is only entitled to income diversion if he meets all the other requirements for the program. This diversion is not available if the community spouse uses spousal refusal.

Keep in mind that your client has many other expenses and obligations that make up his monthly expenditures. He has a car loan, his Medicare supplement insurance premium, lawn care, pool maintenance, and pest control, among other items. The loss of much of his wife's income will make a significant impact on his life. There is a provision in the ESS Manual s. 2640.0122 whereby your client may establish that the income allowance is inadequate due to exceptional instances of significant financial duress. In this case, a hearing officer may establish a higher income allowance. This process requires a denial of benefits and a fair hearing. Experience has shown that the outcome is less than certain.

BUT WAIT, THERE'S MORE! There is still an option for your client. Be sure to read about it in the next issue of *The Elder Law Advocate,* where we will explore spousal support unconnected with the dissolution of marriage under Florida Statute 61.09.

***Kara Evans, Esq.**, 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.*

2018 Elder Law Annual Update and Hot Topics

Thank You to Our Sponsors

IRAs—tax traps with alternative investments

One of the benefits of an IRA-type account is that the investment grows tax deferred—no income tax is paid until the asset is removed from the IRA. (Of course, it is completely tax free if it is a Roth IRA.) One downside, however, is that this also means the investments held by the IRA that would otherwise receive capital gain income tax treatment will instead be taxed as ordinary income when distributed. In addition, there is no basis step up of the IRA assets at the death of the account holder.

But there is a bigger trap. More and more clients are looking at alternative investments such as master limited partnerships, hedge funds, and private equity funds as IRA investments, and IRA custodians are increasingly allowing these alternative investments.

While some of these alternative investments are considered higher risk, some are not as "risky" as they may have been in years past, especially when part of a balanced investment portfolio. Increasingly we are seeing otherwise appropriate alternative investments in an elder client's investment portfolio.

But what is the trap? The income from these alternative investments may be deemed unrelated business taxable income (UBTI). UBTI is a concept more commonly seen when charities invest in certain businesses unrelated to their exempt purpose. But the same concept holds for IRAs. Above a threshold amount of UBTI (recently $1,000), an income tax return for the IRA will need to be filed and the income tax paid at the higher trust income tax rates. And assuming it is not a Roth IRA, when the funds are distributed from the IRA, it will be taxed again.

TAX TIPS

by Michael A. Lampert

Practice tip: If you see a client considering these types of alternative investments, have the client verify how the investments are taxed and, when appropriate, seek tax advice.

Offshore financial accounts—yet another update

Unreported offshore financial accounts would seem to be old news. Yet despite all of the publicity and the many thousands of voluntary disclosures, there are still significant numbers of undisclosed foreign financial accounts. The elder lawyer needs to remain aware of the possibility of the existence of these accounts, both during pre-death planning and post-death administration.

The IRS's enforcement in this area continues to grow. It is becoming a multinational effort, with other countries sharing information with the United States and even jointly investigating taxpayers. It is increasingly data driven. The IRS has information from prior enforcement, the many thousands of voluntary disclosures, as well as reports by foreign financial institutions and governments. One hundred thirteen countries are now a part of the information reporting under the Foreign Account Tax Compliance Act (FATCA). The Department of Justice continues to enforce failure to file the Foreign Financial Account (FBAR) form. In 2014, there were seven FBAR Department of Justice enforcement actions. By October 2017, there were 52. This is in addition to the IRS's FBAR penalty assertions. The chances of a taxpayer not getting caught continue to go down. Remember that this same issue—not reporting offshore income—is a problem not only in the United States with its taxpayers but also for many foreign countries with their taxpayers. If that is not enough, in 2016 there were 187 criminal indictments for offshore issues. For 2017, through August 31, 2017, there were 201 indictments.

There are an estimated 3 to 9 million U.S. citizens living outside the United States. Approximately 350,000 income tax returns showed the foreign earned income exclusion, and approximately 970,000 returns showed the foreign tax credit on earnings. In 2015, only 1.3 million FBARs were filed. These numbers indicate that there are significant numbers of foreign financial accounts that remain unreported. And when the client dies, the problem does not go away—it often becomes the family's problem.

Practice tip: Always ask if your client was a. U.S. citizen from birth. When appropriate, ask about other citizenships.

Practice tip: Ask about ownership or control of any foreign financial accounts—directly or indirectly; outright; in a trust, corporation, or other entity; or otherwise. The goal is not necessarily to know how to deal with the asset but to recognize the issues.

Tax reform

This may be the shortest tax tips topic I have written. There are numerous tax reform proposals. I have no idea what, if anything, will pass. And if I write about a current proposal, who knows if it will be the latest proposal upon the article's publication?

Practice tip: What elder law attorneys can try to do to address unknown tax law changes is attempt to build flexibility into the planning. For example, rather than mandating the use of a credit shelter trust, perhaps draft it: "all to surviving spouse, but if disclaimed, then to the shelter trust." This allows the decision to be made after the first spouse to die's death.

Why did the bank freeze the wire from my mom in Cuba? Blocking and OFAC

My client just wants mom's money.

Recently I was retained to assist in obtaining a release of blocked funds. There was a wire transfer from Mom's non-U.S. financial account to her adult daughter's U.S. bank account. The client received a notice from the bank that due to regulations issued by OFAC, access to the transferred funds had been restricted (blocked).

What is OFAC? The Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy, or economy of the United States. OFAC acts under presidential national emergency powers as well as authority granted by specific legislation to impose controls on transactions and to freeze assets under U.S. jurisdiction. Many of the sanctions are based on United Nations and other international mandates, are multilateral in scope, and involve close cooperation with allied governments.

OFAC maintains lists of individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries. It also lists individuals, groups, and entities such as terrorists and narcotics traffickers designated under programs that are not country-specific.

Some of the sanctions include (not complete list):

- $ North Korea sanctions
- $ Cuba sanctions
- $ Iran sanctions
- $ Ukraine-Russia-related sanctions
- $ Syria sanctions

So, why should an elder lawyer care about OFAC?

Our elder clients sometimes have family members or assets (or both) in countries subject to sanctions. There are significant restrictions on transferring and receiving assets from these countries.

It is often possible, however, to apply for and obtain an OFAC license to have the funds released. The process is not always difficult, and while not required, the process can be started online at OFAC's website. Unfortunately, it can take many months, and sometimes a year or more, to obtain the approval.

The application is not particularly difficult to complete. It asks for information on the applicant, financial institutions, payers, and a detailed explanation of the transaction, including the purpose of the payment.

It is hoped that the transaction resulting in the blocked transaction is aboveboard. For example, Mom lives in Cuba with her dual citizen (Cuba and Spain) spouse. Cuba real property owned by Mom and her spouse is sold, and Mom wants to transfer funds to her daughter in the United States. Because the funds are emanating from Cuba, the U.S. financial institution will likely block the release of funds until a license is received from OFAC.

It is very important to clearly explain the transaction on the application and to provide adequate backup. If OFAC asks for additional information, it should be clearly, fully, and promptly provided. Unfortunately, when clients try to fill out the application, there is a tendency not to describe the underlying transaction accurately. Sometimes this is due to the client not understanding what information is needed. Sometimes it is due to the client reporting what he or she thinks OFAC wants to hear. These incomplete and inconsistent applications will lead to even further delay, if not outright denial, of the application.

Practice tip: If you are assisting the client in completing the application, make sure you understand what actually happened. Does what the client tells you make sense? Make sure that what the client tells you is consistent with the documents.

Practice tip: Clients need to understand that it can take some time for the funds to be released once blocked. Consider planning for the delay, or see if there are legal transfers that would not be blocked.

Summary of selected case law

by Diane Zuckerman

Rosalie Wolf, Appellant, v. Jo Ann Doll, individually and as Successor Trustee of the Gretchen T. Reysman Revocable Trust Dated November 3, 2005, Appellee, No. 4D16-2634 (4th DCA, 2017)

Issue: Whether there was a genuine issue of material fact as to whether the appellant received notice of a prior probate action, thereby precluding summary judgment in a collateral action.

Answer: Yes. This case involves a contest over trust/estate assets between a friend and a neighbor of the decedent. The decedent had a living revocable trust in which her condominium was titled. In 2010, she amended her trust so that the condominium and personal property would be distributed to her friend, Rosalie Wolf. Later, after falling and breaking her hip, the decedent executed another amendment to her trust. This amendment gave the property to the neighbor, Jo Ann Doll, revoking the same gift to her friend, Wolf.

Upon the decedent's death, the neighbor Doll petitioned for summary administration, indicating Doll was a beneficiary under the trust, and seeking the transfer of the estate assets of personal property to the trust. The certificate of service on the petition for summary administration indicated Wolf was served, but did not state by what method. Neither was proof of service filed in the underlying probate proceeding. Wolf did not participate in the summary administration, and an order was entered transferring personal property to Doll. Later, under the terms of the amended trust, the condominium was transferred to Doll.

Later, Wolf filed a civil action against Doll, alleging tortious interference with an expectancy, constructive trust, declaratory relief, and conversion. After discovery, Doll moved for summary judgment on the grounds that Wolf's claims were procedurally barred as an improper collateral attack, arguing that Wolf should have raised these claims in the probate proceeding. Wolf disputed the fact she had actual knowledge, thereby creating an issue of a material fact. The civil trial court granted the summary judgment and in its order found "[Wolf] was aware of the probate proceeding." The appellate court stated that there was no indication that the trial judge considered the issue of formal notice compliance in his ruling.

Upon review, the Fourth District found that material issues of fact related to whether the appellant had either actual or statutorily required formal notice of the summary administration action. Noting that the lower court did not consider evidence on the issue of formal or actual notice, the summary judgment was reversed and remanded.

Further the court cited *Nardi v. Nardi,* 390 So. 2nd.438 (Fla. 3d DCA 1980), for the proposition that adherence of formal notice is required, whether actual notice exists or not. This cite is likely giving guidance to the lower court in addressing the issue.

Practice tip: Strict adherence to the probate formal notice procedures can avoid subsequent collateral litigation. Relying on actual notice received by beneficiaries is likely insufficient to cut off later claims.

Reformation of invalidly signed amendments to a trust

Jill Kelly; Jeff Falkenthal; and Judy L. Mors-Kotrba, as Successor Trustee, Appellants, v. Donna Lindenau, Appellee, Case No. 2D16-2011 (2nd DCA, May 17, 2017)

Issue: Whether invalidly signed amendments to a trust can be subject to reformation under § 736.0415, Florida Statutes (2016).

Answer: No. Facts revealed the decedent had created and executed a revocable trust under Illinois law in 2006. Subsequently he moved to Florida and had two amendments to the trust prepared by his Illinois attorney, although he executed them in Florida. The second amendment to the trust devised a specific piece of real property to the appellee, but was signed by only one witness. The decedent died on February 7, 2015, at which time his trust became irrevocable.

The successor trustee filed a petition for declaratory judgment to determine the validity of the amendments. In a counterclaim, later amended, appellee Lindenau alleged that the failure to have two witnesses sign the amendment was a "mistake of law" and sought reformation of the trust, under § 736.0415, Florida Statutes (2016), to conform with the settlor's intent.

The successor trustees filed a motion for summary judgment, arguing that the amendments were not executed in compliance with Florida law, and thus were invalid. Summary judgment was denied, and the case proceeded to a bench trial. The trial court granted the appellee's petition for reformation and ordered the successor trustee to transfer the real estate to the appellee within 10 days of final judgment. The testator's intent to give the property to the appellee was not in dispute. The appeal ensued.

In reversing and remanding the decision, the appellate court found three errors made by the trial court; in denying the appellant's petition for declaratory judgment, because the amendments were not signed in accordance with Florida law; in its application of § 736.0415 to an otherwise invalid trust; and in its order requiring transfer of the subject real

property to the appellee.

Practice tip: This case reminds us that strict adherence to the procedural requirements in making a will or a trust is of ultimate importance. Otherwise, it may result in a gift that is counter to the testator's intent.

Objection to validity of a will

Karen Winslow, Appellant, v. Mallory N. Deck as Personal Representative of the Estate of Michael S. Deck, Appellee, No. 4D16-4312, (4th DCA, 2017)

Issue: Whether the filing of a second will and four other responsive pleadings served as an objection to the validity of the will, in compliance with the three-month statute of limitations under § 733.212 (3) Florida Statutes (2013).

Answer: Yes. Two wills were at issue in this case, one executed in 1991, gifting the decedent's assets to his two adult children, and one executed in 2014. The 2014 will purported to revoke the 1991 will, and gifted assets to the appellant rather than to the adult children.

The decedent died in 2015, and shortly thereafter the appellee served a petition for administration of the 1991 will and served the appellant in accordance with § 733.212(3). The 1991 will was admitted to probate, and the appellee was appointed personal representative of the estate by orders dated May 7, 2015.

In response, on May 27, 2015, the appellant filed the 2014 will, along with four pleadings described as: 1) an emergency petition to revoke letters of administration; 2) a counterpetition for administration; 3) an objection to the appellee's petitions; and 4) a declaration that the probate proceeding was adversary. The court denied the appellant's emergency petition without prejudice but upheld the letters of administration issued for the 1991 will.

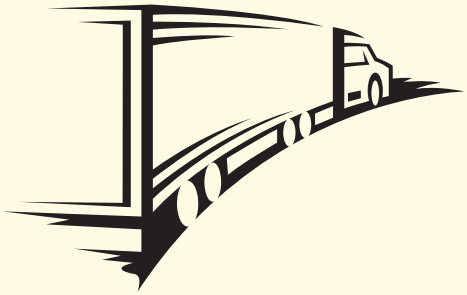
After a year, the appellee moved to dismiss the counterclaim with prejudice, arguing that none of the responsive pleadings filed by the appellant specifically requested the first will to be revoked. The appellant countered that the motion to dismiss should be denied or that she be allowed to amend her counterpetition. The trial court sided with the appellee, and ruled that the appellant was barred for failing to seek timely relief, pursuant to § 733.212(3).

On appeal, the Fourth District reversed in accordance with the strong public policy of allowing amendments to pleadings. It found that the responsive pleadings contained language asserting that the 1991 will was not the last will, and the counterpetition did seek to admit the 2014 will to probate. Further, the appellate court noted that the counter-allegations asserted that the 1991 will had been revoked by the 2014 will. The appellate court deemed these allegations sufficient to satisfy the requirements, despite any technical deficiency in the pleadings.

The appellate court concluded that the motion to dismiss with prejudice was improperly granted, and that the appellant should have been granted leave to amend her counterpetition to request the proper relief. The Fourth District found that because the counter-pleadings were filed timely, the appellant was not time barred under the provisions of § 733.212(3). Accordingly, the case was reversed and remanded to allow leave to amend. The court also noted that no prejudice to the appellee had been demonstrated in allowing an amendment.

Practice tip: This case can be relied upon when seeking to avoid a motion to dismiss. Relying on technical defects is rarely grounds for a dismissal with prejudice, unless the party seeking amendment has abused the privilege, or the opposing party can show prejudice as a result.

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.*



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