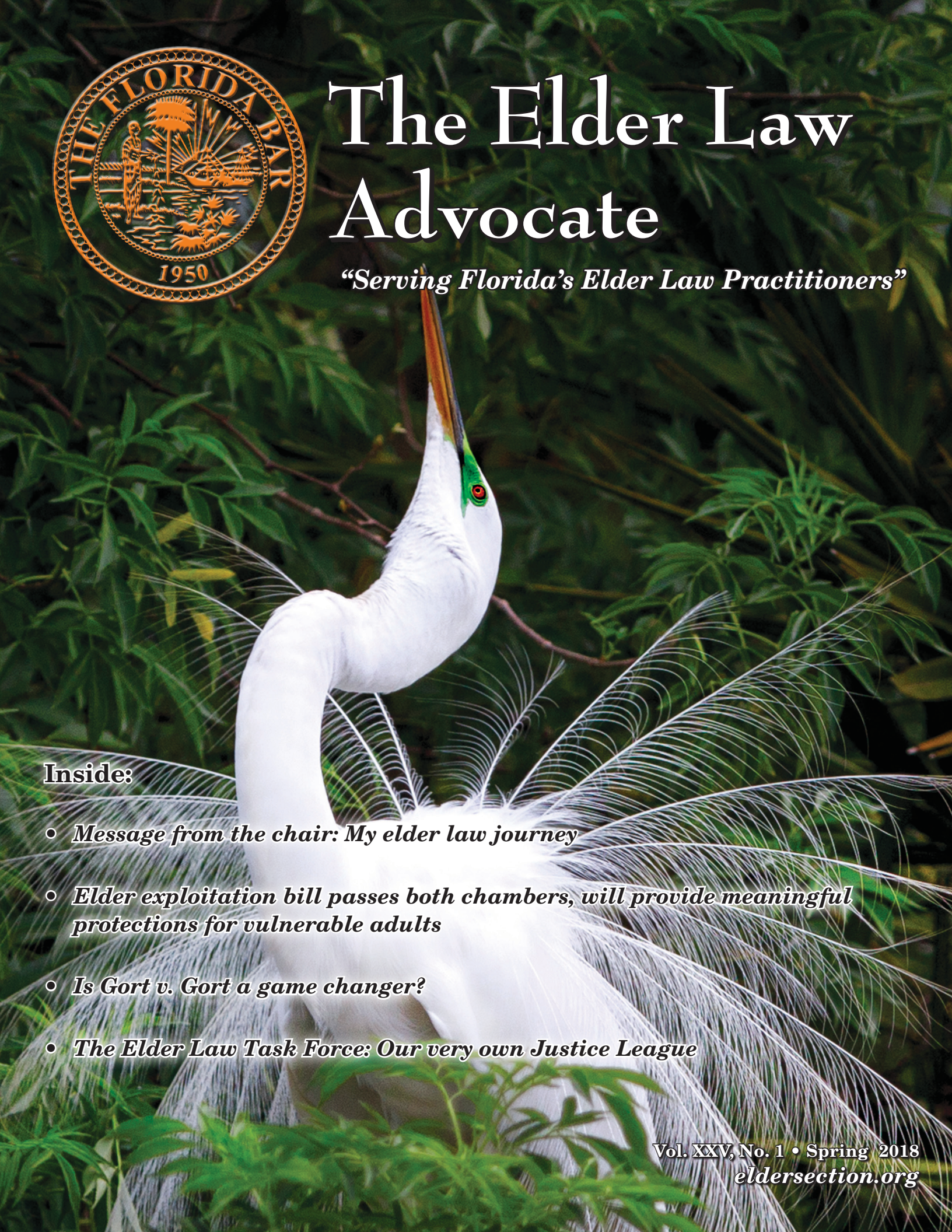

The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Inside:

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Vol. XXV, No. 1 • Spring 2018
eldersection.org

The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar

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

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

COVER ART

Great White Egret
by Randy Traynor

5/2018

Contents:

The deadline for the SUMMER 2018 EDITION: July 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 to Genny Bernstein at *gbernstein@jonesfoster.com*, or call Leslie Reithmiller at 850/561-5625 for additional information.

My elder law journey

To whom much is given, much is required. Luke 12:48

I was 15 years old when my family migrated to the United States. Back then, my career goal was to become a neurosurgeon. I was a pre-med major and never seriously considered law as a career until my junior year in college, when to meet an elective requirement, I reluctantly took international law. Surprisingly, I found myself enjoying reading for class and looking forward to the class discussions.

Upon graduation from Florida International University, I immediately entered the workforce and put my dreams for higher education on hold. I worked for several years in the banking industry, starting as an entry-level drive-through teller and working my way up through various positions to vice president and commercial banking manager at two major banking institutions. Then, 10 years after graduating from college, I decided to return to school and study law. So, here I was, with two daughters in elementary school, managing a large commercial bank, attending soccer games, baking cookies for PTA, and studying for the LSAT. At the time, I envisioned becoming a corporate law attorney and practicing in the glamorous arena of international banking.

I applied for and was accepted into the accelerated law program at St. Thomas University School of Law in Miami. It was a scary move, swapping a six-figure salary for student loans. I traded in my business suits and heels for jeans, sneakers, and a roller bag. Little did I know that I would also be giving up sleep and at times, my sanity. My typical day consisted of waking up at the crack of dawn, getting my elementary-age daughters off to school, and rushing off to class. Then pick up from aftercare by 6 p.m., make dinner, sit through homework with my daughters, get them to bed by 8:30 p.m., and study until midnight. I also had to fit in Girl Scout meetings, selling cookies, science fair projects, and field trips. In addition to all this, I managed to work a part-time job at my law school as a teaching assistant for torts and legal writing.

Collett P. Small

Message from the chair

While at St. Thomas, I met fellow student David Hook, who later went on to become chair of this section for 2015-2016. He told me about an elder law clinic he was taking and spoke very highly of the program. I applied for the elder law clinic and interviewed with a Broward County administrative probate judge, Mel Grossman. I was accepted into the program and served my internship with Judge Grossman. I enjoyed my internship and learned a lot about the field of elder law. I also signed up for the elder law course offered by my school, which was taught by Professor Enrique Zamora, who later became chair of the Elder Law Section for 2011-2012. I found out I was really an elder law nerd when I received the book award that semester for elder law.

Within months of graduating from law school, I hung my own shingle and opened a general law practice. I practiced elder law, family law, criminal law, immigration law, personal injury, and contracts law. My goal was always to have a full-time elder law practice, but until I could build up a large enough caseload, I kept the lights on with cases that walked through the door. To realize my dream of a full-time elder law practice, I started to attend every CLE put on by the Elder Law Section and immersed myself in elder law books written by the Father of Florida Elder Law, the late great Jerome Solkoff. To gain experience, I wrote to all the Broward probate judges and asked to be appointed on pro bono cases. I also joined the Broward Bar Association's low-cost panel and signed up with legal insurance carriers for elder law cases.

I also started to attend the Elder Law Section's executive council meetings, where I would sit in the back of the room and quietly observe. I remember feeling intimidated by how brilliant these elder law attorneys were and being very impressed by the complex issues they dealt with. Slowly I started volunteering to work on projects and to join committees to get to know the leadership of the Elder Law Section. I vividly remember one such executive council meeting when I timidly raised my hand and volunteered to be on the newly formed Website Committee.

Fortunately for me, the Elder Law Section is a very nurturing one. People started to take note of the work I was doing, and I got to know members from across the state who would become my mentors. I still recall how pleased I was to learn of my appointment to become the CLE chair of the section, a position I held for many years and probably my favorite position (except for section chair, of course). Another milestone moment was finding out at The Florida Bar Annual Convention in Boca Raton in 2013 that I had been appointed to the Elder Law Section

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My elder law journey

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Executive Committee and would serve as secretary for the section. I have served this section in several roles, including law school liaison, treasurer, and substantive chair, and I enjoyed serving in each and every position (except treasurer … whew, that was challenging!).

I became board certified in elder law in 2014. Board certification is The Florida Bar's highest level of evaluation of the competency and experience of attorneys in their practice areas. The elder law board certification exam was extremely challenging and required many hours of studying. It was worth the extra effort to have this certification from The Florida Bar to show that I have been evaluated for professionalism and tested for my expertise in the area of elder law.

Now, here I am, serving as chair of this amazing section. I continue to be impressed with our section members' knowledge of complex issues and their dedication to advocating for and protecting the rights of the elderly and vulnerable in our state. Each week, I receive calls or emails from law students, new attorneys, or experienced practicing attorneys who are thinking about practicing in the field of elder law. I welcome these calls and look forward to opportunities to assist other attorneys to develop in this area. I ALWAYS make the time to speak with these attorneys, to answer their questions, and to meet with them when possible. I believe that in learning you will teach, in teaching you will learn. I really enjoy my role of being a mentor.

My advice to those considering practicing in elder law is first of all to join the Elder Law Section. This is a great section filled with attorneys who are willing to assist you if they see that you are making an effort. I also recommend that you join the Mentoring Committee. This committee is co-chaired by Stephanie Villavicencio and Raiza Reyes, and they have regular mentoring lunch and learn CLEs via conference calls featuring experienced elder law attorneys. I suggest that you attend as many CLEs as possible; this is a great way to stay current with emerging law and trends as well as a way to network and meet experts in the field. Additionally, I recommend joining and actively participating in an Elder Law Section committee in the area you are most interested in.

My term as chair ends in June, so this will be my last message as chair. It has been a great privilege to serve. I look forward to seeing this section continue to grow and achieve excellent results.

I alone cannot change the world, but I can cast a stone across the water to create many ripples.
— Mother Teresa

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.

Elder exploitation bill passes both chambers, will provide meaningful protections for vulnerable adults

Capitol Update

by Brian Jogerst

The 2018 Legislative Session ended on March 11 after a two-day extension. This extension was largely due to the extra time the House and the Senate needed to resolve the differences between the two chambers' budgets. More than 2,000 bills are filed each year between the House and the Senate, and the Academy of Elder Law Attorneys and the Elder Law Section of The Florida Bar were actively engaged in a number of key issues. Following is a session overview:

Budget

Prior to the legislative session, revenue forecasts projected a small surplus for the 2018 Legislative Session. After Hurricane Irma hit Florida, this surplus was quickly eliminated, setting the stage for budget reductions. In addition, after the Parkland tragedy, Governor Scott, along with House and Senate leaders, pledged $400 million in new school safety funding, so many programs received an additional reduction or did not receive new funds for the next fiscal year.

Elder exploitation/asset protection

Senator Kathleen Passidomo (R-Naples) filed Senate Bill 1562 and Representative Colleen Burton (R-Lakeland) filed House Bill 1059 designed to create a 15-day injunction, without the need to first hire an attorney, to prevent assets from being shifted from a vulnerable adult. The legislation was based largely on the domestic violence injunction, permitting the vulnerable adult to file the petition with the clerk of the court for the 15-day injunction. AFELA and the ELS worked with the RPPTL Section, the Florida Bankers Association, as well as the clerks of the court to resolve concerns and to address questions they raised, including a provision ensuring that certain expenses can still be paid once the injunction is filed and ensuring that the financial institutions are properly noticed for the asset freeze. Throughout session, we met with legislators and testified before committees, explaining the importance of the legislation and providing examples of people who would benefit from the provisions in the bill.

On March 7, the Senate unanimously adopted the bill, and on March 8, the House unanimously adopted the bill, which Governor Scott signed on March 23. We are grateful to Rep. Burton and Sen. Passidomo for their tireless support and to the Legislature for adopting this legislation the first year it was introduced. House Bill 1059 will provide meaningful protection to our vulnerable adults.

Remote notarization

During the 2018 Legislative Session, we were actively engaged with the electronic wills bill, and the remote notarization provision was one of our major concerns. While the bill passed the 2017 Legislature, we were grateful that Governor Scott vetoed it. For the 2018 Legislative Session, House Bill 771 by Representative James Grant (R-Tampa) and Senate Bill 1042 by Senator Jeff Brandes (R-St. Petersburg) were filed to permit remote notarization. We met with the proponents of the bill as well as with its sponsors to express our concerns about the potential exploitation of vulnerable adults for testamentary documents as well as durable powers of attorney. An amendment was adopted by the House that delayed implementation of remote notarization for testamentary documents by two years, and the "super powers" provisions for durable powers of attorney were excluded from the bill.

During the final days of session, the electronic wills issue resurfaced as a Senate floor amendment to Senate Bill 1042, which adopted the amendment and the bill with only six negative votes. When this bill that included the electronic wills provision returned to the House, we met with legislators and activated the grass roots to oppose it. The good news is that the Legislature adjourned without taking up the bill, meaning that electronic wills and remote notarization were not adopted.

We fully expect this issue to return during the 2019 Session. Over the summer, we will reach out to the proponents of the bill, along with key legislators, to have our issues and concerns addressed. Thank you to everyone who made phone calls or sent emails to their legislators to raise our concerns and objections.

Guardianship/clerks of the court

Senate Bill 1002 by Senator Kathleen Passidomo (R-Naples) and House Bill 1187 by Representative Ross Spano (Riverview) were designed to permit court clerks to conduct additional guardianship audits. One provision of concern was *ex parte* communications between the clerk and the judge.

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Capitol Update

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Working with both sponsors as well as with the court clerks, the *ex parte* provision was removed and House Bill 1187 was adopted by the Legislature.

Vulnerable investors

Prior to session, we met with the proponents of Senate Bill 662 by Senator Kelli Stargel (R-Lakeland) and House Bill 681 by Representative Byron Donalds (R-Naples). The bills were designed to permit security dealers to block the sale or transfer of funds/assets when the sale/transfer is suspicious. While we supported the overall goal to protect investors from exploitation and losing their funds, we were concerned with specific provisions, including blanket immunity for security dealers when sale or transfer is denied, the standard of care set as "reasonable" rather than "good faith," establishing a 15-day freeze but not an additional 10-day extension of the freeze, and exempting transfers from trusted entities. After a series of meetings and discussions, our concerns were resolved and we were able to support the final bill. After some regulatory issues were raised late in the session, the Legislature did not adopt the bill, but we anticipate it will return next year.

School safety

After the tragedy in Parkland, Florida, the governor, along with the House and the Senate, called for changes to gun possession and ownership. AFELA and the ELS have long been concerned with possession of guns by someone who has been declared incapacitated. Senate Bill 7026 was adopted by the Legislature and signed into law by Governor Scott (but has already been challenged in federal court). A provision was included that prohibits anyone who has been "adjudicated mentally defective"—as defined in Chapter 730.065(2)—from owning, possessing, or purchasing a firearm, which includes someone declared incapacitated under Chapter 744.331 (6)(a).

The above is a sampling of bills that AFELA and the ELS addressed during the session. There were other bills—such as Financial Institution Payments to Surviving Successors—that we reviewed and for which we made suggested changes. While our involvement ended because the bill did not receive a committee hearing, this proposed legislation required a lot of initial work and effort by the Legislative Committee.

Overall, the Legislative Committee reviewed more than 55 bills. The committee meets regularly beginning in late fall and then weekly once the legislative session begins. With the large numbers of bills filed each year, additional review of bills would be very helpful. If you would like to be involved, 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. 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 introductions with these legislators and their staff.

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

Is *Gort v. Gort* a game changer?

by Lawrence Levy

As recently summarized in *Action-Line*, Summer 2016, the Fourth DCA in *Gort v. Gort*, 185 So.3d 607 (Fla. 4th DCA 2016), found that the guardianship and probate rules do not prohibit a party from voluntarily dismissing a petition to determine incapacity.

It is this author's opinion that the *Gort* decision opens the door for pre-suit and post-filing mediation as a tool to resolve contested issues in a guardianship proceeding.

In the *Gort* case, the issue of capacity and who should serve as guardian was before the trial court. Prior to the incapacity hearing, the trial court referred the parties to mediation.

An agreement was reached. The agreement was filed with the trial court and the parties voluntarily dismissed their respective petitions.

One year later, an action was filed by one of the parties (the petitioner) against the other parties (the respondent and cousin) seeking to declare the settlement agreement valid and enforceable.

On the petitioner's Motion for Summary Judgment, the trial court ruled, in part:

> (4) it was not improper for the parties to enter into the settlement agreement after a petition to determine incapacity had been filed but before an adjudicatory hearing because there is no requirement for an adjudicatory hearing every time a petition is filed. *Id* at 611.

On appeal, the respondent and cousin argued that the trial court ruling was in error as the ruling was contrary to Florida law and public policy. The Fourth DCA found that:

> Because our guardianship and probate rules do not prohibit a party from voluntarily dismissing a petition to determine incapacity, and section 744.311 does not mandate an adjudicatory hearing, the trial court did not err in finding the settlement agreement did not violate Florida law or public policy. *Id* at 612.

While compelling arguments[1] can be made in opposition to the ruling of the Fourth DCA in *Gort*, the ruling opens the door for a settlement on the issue of incapacity and the appointment of guardian to be reached by the parties.

Issues to be mediated in a contested involuntary guardianship

Individuals face issues regarding their diminished capacity or inability to manage their personal and financial affairs on a regular basis.

A well-conceived and executed estate plan will provide the necessary authority to a person or entity of the individual's choosing in the event that the individual is unable to manage his or her affairs.

However, in the event that no plan is in place or that the documents created in support of the plan are challenged, litigation may ensue.

Shared family decision-making,[2] a form of elder law mediation, will allow for the individual, along with his or her family members, to create a plan to protect the individual's interest and ensure that the individual's wishes are carried out in the event the individual's capacity diminishes.

If shared family decision-making is not a suitable solution, a Petition to Determine Incapacity[3] and for the appointment of guardian[4] may be filed in order to protect the interest of the individual who is believed to have diminished capacity.

The appointment of a guardian in Florida begins with the filing of a Petition to Determine Incapacity. It is the determination of incapacity that triggers the proceedings for the appointment of a guardian.[5]

The issue of whether a person is incapacitated has long been left squarely in the sole discretion of the court. However, following the *Gort* decision, it can be argued that a Petition to Determine Incapacity can be dismissed by the parties. If so, it therefore follows that the parties can mediate the issue of capacity and if needed, the issue of who should be appointed as guardian.[6]

Should the parties agree that the individual subject to the Petition to Determine Incapacity is incapacitated, the next issue to be addressed at mediation is the level of incapacity the individual faces.

The parties can then turn their attention to whether a less restrictive alternative to the appointment of a guardian is available and if such alternative will sufficiently meet the needs of the incapacitated person. Less restrictive alternatives include, but are not limited to revocable trusts, durable powers of attorney, designation of health care surrogate, and living will.

If no less restrictive alternative to the appointment of a guardian exists, then the parties can mediate the issue of who should be appointed as guardian.

As with many mediations, the issue of who bears the burden of attorney's fees and the mediator's fees for the mediation can also be addressed at mediation.

Ultimately, the court must review, ratify, and approve the terms of settlement to ensure that the settlement is in the best interest of the incapacitated person.

Some procedural considerations

The filing of the Petition to Determine Incapacity requires that the court appoint a committee to evaluate the alleged incapacitated person. In the event that the examining

continued, next page

committee has met with the alleged incapacitated person, one can argue that the issue of whether or not the alleged incapacitated person is incapacitated and the level of incapacity are no longer subject to mediation.

Depending on the determination by the examining committee members, the parties should not be able to agree that a person should have a more restrictive form of guardianship than what the examining committee finds necessary. Or in the alternative, the parties should not be able to agree to a less restrictive form of guardianship, which may then place the incapacitated person's well-being in jeopardy.

Once the examining committee, even one member of the committee, renders an opinion of incapacity, the determination of incapacity must be left to the court.

Accordingly, if the parties intend to mediate the issue of incapacity and thereafter dismiss the Petition to Determine Incapacity, the parties must act prior to the appointment of the examining committee, or at the very least prior to the examining committee members filing their report.

Some ethical considerations

Upon the filing of a Petition to Determine Incapacity, the court must appoint an attorney to represent the interest of the alleged incapacitated person. Florida law permits the alleged incapacitated person to select counsel of his or her choice without court approval.Florida Rules of Professional Responsibility require that an attorney representing an alleged incapacitated person must maintain as normal an attorney-client relationship as possible.[7] The duty of loyalty and confidentiality apply, even though the client may be at some level incapacitated.[8]

The attorney representing the alleged incapacitated or incapacitated person, whether court-appointed or private counsel, must abide by the applicable rules of professional conduct as set forth by the Florida Supreme Court.

Furthermore, assuming that the mediation is court ordered, the mediator as well as the parties subject to the mediation must abide by the Florida law related to mediations.[9]

Practical considerations

Mediation can be a lengthy process. Consideration must be given to the alleged incapacitated person's emotional and physical needs during mediation. Mediation can be adjourned and reconvened as necessary. While it is understandable that the parties want to reach a settlement of the issues, as with all mediations, consideration must be given to the needs of the parties to ensure that the mediation will yield a settlement voluntarily entered into by the parties free of duress or coercion.

Conclusion

Incapacity or diminished capacity is an issue addressed regularly by elder law attorneys. Shared family decision-making and formal mediation are means to craft solutions that best serve the interest of the individual in need. The *Gort* decision has opened the door to resolution of contested incapacity and guardianship issues. This expedites the resolution of the issues. Practitioners must incorporate shared family decision-making and mediation as part of their practice when dealing with individuals with diminished capacity.

***Lawrence Levy, Esq.**, is a Florida board certified elder law attorney and a certified Florida circuit civil court mediator specializing in estate planning, probate, guardianship, and elder law issues. Mr. Levy also serves as an adjunct professor of wills and trusts for Miami-Dade College. His office is centrally located in Davie, and he handles cases in Miami-Dade, Broward, and Palm Beach counties. He can be reached at **larry@lawrencelevypa.com**.*

Endnotes

1 Citing in *Jasser v. Saadeh*, 97 So.3d 241 (Fla. 4th DCA 2012, the respondent and cousin argue that *Jasser* is dispositive of the issue and requires the Fourth DCA to find that the voluntary dismissal of a petition to determine incapacity prior to adjudicatory hearing is prohibited. However, in *Gort*, the Fourth DCA distinguishes the facts in *Jasser* from the facts in *Gort* as the basis for not applying the decision in *Jasser* to *Gort*. Of note, however, is that in *Jasser*, the ward suffered from Alzheimer's disease whereas in *Gort*, the respondent suffered from mental illness, which could be managed with proper medication. Furthermore, in *Jasser*, following a hearing, an emergency temporary guardian was appointed whereas in *Gort*, no hearing on the issue the appointment of guardian (emergency, temporary, or permanent) took place. That being said, it is worth noting the factual differences in *Jasser* and *Gort*.

2 Shared family decision-making is a form of elder law mediation. Acknowledgement to Professor Susan F. Dubow and Elinor Robin, Ph.D, Mediation Training Group, Inc., for their fine training in this area.

3 Section 744.3201, Florida Statutes.

4 Section 744.334, Florida Statutes.

5 Section 744.331, Florida Statutes.

6 Subject to approval and appointment by the court pursuant to Section 744.312 and related sections of the Florida Statutes.

7 Florida Rules of Professional Conduct, Rule 4-1.14.

8 Florida Rules of Professional Conduct, Rules 4-1.6, 4-1.7, and 4-1.8. Of note is the case *Holmes v. Burchett*, 766 So. 2d 387 (Florida 2d DCA 2000), which stands for the proposition that an individual is presumed competent to contract, including the hiring of counsel, until the right to contract is removed by the court. However, *see Jasser v. Saadeh*, 97 So.3d 241 (Florida 4th DCA 2012), as to the effect the appointment of an emergency temporary guardian prior to adjudication of the right to contract may have on the alleged incapacitated person's right to hire counsel.

9 Chapter 44, Florida Statutes.

The Elder Law Task Force: Our very own Justice League

by Twyla Sketchley

As elder law attorneys, one of the most sacred parts of our work is safeguarding our clients and other vulnerable adults in our communities from exploitation. We do this through our advocacy, action, and education. One of the most powerful tools in our collective professional tool box is the Florida Joint Public Policy Task Force for the Elderly and Disabled. The Task Force is supported by your help in volunteering your time and contributing your money.

While most elder law attorneys never see the work that goes on behind the scenes by the Task Force, we all see the results. The electronic wills issue is just one example.

Last year, Academy of Florida Elder Law Attorneys (AFELA) and Elder Law Section (ELS) volunteers banded together, through the coordination of the Task Force, and spent hundreds and hundreds of hours monitoring the electronic wills legislation, researching the legal issues related to it, drafting white papers, writing talking points for legislative staff, drafting amendments, attending conference calls with other stakeholders and legislative committee staff, and trying to get their colleagues and clients to contact legislators. Task force members and volunteers trekked to Tallahassee to meet with legislators and to testify before legislative committees. These volunteers spent their own money and took time out of their practices to put faces to this legislation, to present practical situations, and to advocate for the protection of vulnerable Floridians. In spite of the hundreds and hundreds of hours the Task Force spent, the Legislature passed an electronic wills bill.

Even though the Legislature passed the electronic wills legislation, the Task Force continued to fight for the protection of vulnerable adults. The Task Force took the battle to Governor Scott. When the bill went to the governor for his approval, dedicated task force volunteers dropped everything and spent more hours drafting a letter to the governor outlining the harm that would come to Floridians and the state's underfunded court systems from the legislation. The governor vetoed the bill. He used the bulk of the Task Force's letter in the veto statement explaining his veto.

This year, the electronic wills issue snuck back into the Florida Legislature in the form of the electronic notarization bill. Again, task force volunteers and elder law leadership leapt into action, with hundreds spending hours researching the bill, drafting amendments, writing white papers of our concerns, creating talking points, and discussing the issue with legislators and stakeholders. At the last minute, while the notarization bill was being voted on by the Senate, an electronic wills provision was amended onto it and passed without any committee review or input from stakeholders. Fortunately, within minutes, task force volunteers donned their capes and mobilized for the protection of vulnerable Floridians. They reached out to legislators they knew, wrote talking points, cajoled friends and colleagues to contact legislators, and monitored the remainder of the legislative session until it ended on Sunday, all to defeat the electronic wills legislation.

All of this work on the electronic wills bill was in addition to the other missions of the Task Force: 1) helping draft and/or pass several laws adding to the protections of elders against exploitation; 2) monitoring dozens of other bills that impact elder law practices and elderly clients; and 3) monitoring Department of Children & Families, Agency for Health Care, and Department of Elder Affairs rules. This year, the Task Force and elder law leadership monitored and responded to the Florida Constitutional Revision Commission's proposals impacting elders, vulnerable adults, and people with disabilities. Also this year, the Task Force helped pass the Injunction for Protection from Exploitation/Asset Protection of Vulnerable Adults (House Bill 1059), which allows a temporary injunction against the loss of a vulnerable adult's assets if exploitation is suspected.

The Task Force welcomes everyone to join these efforts and make suggestions. If you have relationships with legislators, government officials, or leadership in other organizations, please let the Task Force know. Your relationship may be the one thing that sways a legislator.

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SECTION NEWS

Elder Law Section Welcomes New Administrator

Leslie Reithmiller

The Elder Law Section is pleased to welcome its new administrator, Leslie Reithmiller. She joins The Florida Bar after almost five years with the Office of Court Education, Office of the State Courts Administrator (OSCA). During her tenure at the OSCA, Leslie planned and marketed judicial education programs, facilitated the continuing judicial education accreditation and tracking processes, designed and managed web and marketing content, and worked closely with judicial leadership and faculty members to plan education courses statewide. She received the OSCA Award of Excellence in 2017.

"I am truly excited to join The Florida Bar as program administrator for the Elder Law Section," Leslie says. "I am enjoying the learning process in my new role and am eager to meet all of you. The ELS is a dynamic group of legal professionals, and I look forward to assisting the section in accomplishing its goals."

Leslie holds a bachelor's degree in history from the University of West Florida. She and her husband have two young sons, ages 3 and 18 months. In her occasional free time, Leslie enjoys reading, writing, useless trivia, and ballroom dancing.

ELS says farewell to Chris . . .

As we welcome Leslie, we also must bid farewell to Chris Hargrett, who served the Elder Law Section so well as section administrator. He recently moved to Michigan to be closer to family. Chris was our program administrator from 2016 to 2018, and during that time he:

- Improved communication between section's and the Bar's leaderships by managing the internal and external communications and relations to ensure plans, activities, and guidelines adhered to the section's bylaws and The Florida Bar's policies;
- Increased meeting attendance through marketing campaigns to section members about section meetings, seminars, retreats, and special events via email blasts, social media postings, newsletters, and website updates; and
- Facilitated the planning and execution of section meetings, seminars, retreats, and other special events by coordinating and working with hotels, restaurants, audio-visual technicians, and other vendors.

Chris will be greatly missed, but the section is in good hands as Leslie takes on the role of section administrator.

The Elder Law Section sends Chris off in style, ready to face the cold in Michigan.

SECTION NEWS

Hello, Genny!
Thank you, Kristina!

Genny Bernstein

The Elder Law Advocate is pleased to welcome Genny Bernstein to its production team. She joined co-editor Heather Samuels on this edition, filling the shoes of Kristina Hernandez-Tilson, who recently moved to a new firm. The Elder Law Section is grateful to Kristina for her years of service on the Publications Committee and welcomes Genny as she takes on her new role.

Genny Bernstein is a Florida Bar board certified elder law attorney with over 15 years of experience. She recently joined Jones, Foster, Johnston & Stubbs as senior counsel in its Estate Planning and Elder Law practice groups with offices in West Palm Beach, Palm Beach, and Jupiter. She is a Florida native, a graduate of Florida State University, and she received her JD from Nova Southeastern Shepard Broad Law Center.

"I am delighted to be part of such a distinguished group," says Genny. "I look forward to contributing to the *Advocate* and participating in other exciting initiatives within the Elder Law Section."

Kristina Tilson is now practicing as a trust and estates litigator and probate administrator in the Coral Gables office of Dunwody White & Landon. She and her husband just celebrated their daughter's first birthday.

Mark your calendar!

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

July 19-21, 2018
FSGA 31st Annual Conference
Hyatt Regency Grand Cypress Orlando
Orlando, Florida
floridaguardians.com • 800/718-0207

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

MEMBER NEWS

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

The Florida Bar President's Pro Bono Service Award was established in 1981. Its purpose is two-fold: "to further encourage lawyers to volunteer free legal services to the poor by recognizing those who make such public service commitments; and to communicate to the public some sense of the substantial volunteer services provided by Florida lawyers to those who cannot afford legal fees." This award recognizes individual lawyer service in each of Florida's specific judicial circuits as well as one Bar member practicing out of state. Elder Law Section members John J. Kendron and Timothy A. Moran were among the recipients recognized in a ceremony before the Florida Supreme Court justices on January 25 in Tallahassee.

John J. Kendron

3rd Judicial Circuit (Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee, and Taylor counties)

John J. Kendron has spent his career practicing in Lake City, where he helped form Robinson, Kennon & Kendron PA in 2005 and specializes in estate planning, probate, and elder law. In rural North Florida, home ownership and real property problems are common and complicated. These cases are a priority for Three Rivers Legal Services, but the staff at TRLS would be unable to meet the demand alone. That's where Kendron steps in. He has been volunteering with Three Rivers Legal Services for more than 15 years, helping mostly low-income and elderly homeowners clear title to their property so they can be eligible for funding to make their homes safe and habitable. Additionally, Kendron has provided training to the staff attorneys of TRLS and has served as a mentor to the attorneys regarding probate and guardianship matters. Kendron also received the President's Pro Bono Service Award for the Third Judicial Circuit in 2006 and 2009. He is a graduate of Florida State University and received his JD there in 2000.

Timothy A. Moran

18th Judicial Circuit (Brevard and Seminole counties)

Timothy A. Moran recently handled a case that showed the difficulties and the rewards of pro bono service. An elderly couple, both with hearing impairments and other disabilities, faced bankruptcy. The man, a veteran, and his wife were receiving collection calls and feared losing everything. They were not judgment-proof, but Moran went out of his way to provide the accommodations necessary for them to complete credit counseling and debtor education. His pro bono representation resulted in a discharge of debts and gave them peace of mind. Since 2009, he has donated more than 1,900 hours of pro bono legal services through Community Legal Services of Mid-Florida, Volunteer Lawyers Project. Moran was awarded the Community Legal Services 2017 Champion of Justice Award, which has been renamed the Timothy A. Moran Champion of Justice Award in his honor. In 2012, he received The Florida Bar Young Lawyers Division Pro Bono Service Award. Moran received his JD from the University of Florida Levin College of Law in 2004 and was admitted to the Bar in 2007. His Law Office of Timothy A. Moran is in Oviedo.

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PRACTICE MANAGEMENT

Slack, Evernote, Azendoo, Fleep … How do you project manage?

by Audrey J. Ehrhardt

When it comes to managing your employees, your projects, your workflow … and keeping all the information organized and in the right folder, what do you consistently use? Are you using legal practice management software for this purpose? Or are you stepping out of the practice management software arena and finding solutions in apps? Is everyone on your team engaged and active?

If there's one thing the new generation of workforce has in common, it's the use of the smartphone for everything. Word processing, calendaring, texting, chatting, collaborating, multitasking—the former communication-only device is now used for just about anything you can think of in your business. Finding the right day-to-day task software to increase your efficiency, your productivity, and your profitability in your law firm may be less about tethering it to your practice software machine and more about expediting and consolidating communications.

In our company, we love Evernote and Slack, but that doesn't mean the literally hundreds of other options are not great! Azendoo, Fleep, Jostle, Moxtra … there are many other options for you depending on what you want to get out of your practice. The question becomes: Just what do you actually use the software for? Other than having it sit on your smartphone or tablet with the proverbial answer *"Well, I downloaded Evernote two years ago but didn't have time to get into …"*

Let's take a minute and talk about the five benefits of task software we love!

1. Your team will be more organized. Want to stop misplacing things or being on the wrong page with responsibilities? Visualizing what is actually going on in your business can be a powerful option that tools like these enable you to see. Collaboration tools are incredibly powerful and can enable you to take your organization to the next level.

2. Real time task management. Tired of having an outdated task list? Frustrated when your team members forget to update it? Put it in a list or a chat or a workflow in any of these software tools. If your receptionist sends out the welcome packets to your new clients, he or she can check off that the work was done in real time so you can get the update and keep the pulse on how things are getting done in your office.

3. Stop the email madness. These tools allow you to put your whole team in one conversation. Say good-bye to miscommunication and long email threads. Now your team members can find everything they need to know in one location. No more shuffling through emails to find files.

4. You can share any type of document with your team at any time. Keep in mind, not all apps have the same functionality. You want to choose a tool with access to whatever information you use in your business. PDF, doc, video, photo, PowerPoint presentation, whatever it may be ... you can share it with your team! Sometimes it is hard to attach certain documents over email or they get lost in the shuffle, but these tools solve this problem.

5. Relatively low cost. The costs for most programs like these are based on users or business level. Be sure to consider the free trials available, and take the time to use them. Want to learn how to use one of these for free? With Slack there is a free trial for an unlimited amount of time! Why would you not want to take advantage of a free app that will make your business and team more organized? If you want to upgrade Slack, you can pay $6.67 monthly and receive Slack credits that will give you benefits.

Communication, project management, and task delegation are a vital part of every business. Don't wait to try out these management tools to keep your law practice moving in the right direction because, 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 www.practice42.com.*

The Practice Resource Institute

The Florida Bar's most comprehensive resource for running your law practice.

The Florida Bar's Practice Resource Institute is designed to help Florida lawyers with law office operations and to assist members' use of technology. This new digital resource is available on The Florida Bar's website, where members can:

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Spousal support orders and Medicaid

Tips & Tales

by Kara Evans

The tale: You have already explained to your client that it is against public policy and federal regulations to require an individual to pay so much of his income to a nursing home that his spouse becomes impoverished. You've even done the math, which shows that he can have enough of his institutionalized spouse's income diverted to him to bring his monthly income to $3,090. But this calculation takes into consideration only a portion of the community spouse's expenses for rent or mortgage, taxes, insurance, monthly condominium maintenance or homeowners' association fees, plus the standard utility allowance. Your client has large credit card bills, a car payment, auto insurance, health insurance, and some old medical bills he is paying over time. His monthly expenses far exceed $3,090. In fact, he will need 100% of his wife's income to continue to meet his monthly obligations. There is still hope for your client.

The tip: Remember that 42 US Code § 1396r-5(d)(5) states "If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered." Section 2640.0119.03 of the Florida ESS manual also states "If there is court ordered support against an institutionalized spouse (for monthly support income for the community spouse), the community spouse's monthly income allowance cannot be less than the amount ordered." We need a court order of support for your client.

If you look under Florida Statutes § 61.09, there is a provision for spousal support not connected with a dissolution of marriage. This is an action in family court. When considering a petition for support, the family court takes into consideration ALL of your client's monthly expenses, not just shelter expenses. How do you go about getting this all-important order for your client?

First, you must remember that this is an adversarial action. Each spouse must be represented by counsel. If the institutionalized spouse is incapacitated, the agent under a durable power of attorney may act on his or her behalf. (At this point in the article, you should be checking that your durable power of attorney document has language that allows this. Something like "to sign any and all documents on my behalf in association with an action for spousal support unconnected with dissolution of marriage including petitions, answers, waiver of appearance, etc."). If your client, the community spouse, is named as the agent, you may want to have him resign in favor of the alternate agent for purposes of this action only.

Your court documents should follow the family law rules of procedure and will include the petition for spousal support unconnected with dissolution of marriage, a statement of income and expenses for your community spouse, an agreement for payment, answer by the institutional spouse along with acceptance of service, waiver of appearance, and a draft of the final judgment. You can include a provision for increases to keep pace with inflation. If your client's spouse is already receiving Medicaid benefits, be sure to give notice of the petition and the hearing date to the Department of Children and Families.

A word of caution: Many of the DCF jurisdictions will not allow spousal diversion of income or honor a court order of spousal support if the community spouse has refused to make his or her assets available. If your client is using spousal refusal as the technique to qualify the spouse for Medicaid, be sure to check with other experts in your area to see how your regional office handles this issue.

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

New-"est" tax act (and new tax form)

Most people think of Public Law no. 115-97, commonly known as the Tax Cuts and Jobs Act signed by President Trump on Dec. 22, 2017, as the new tax act. Yet on Feb. 9, 2018, the president signed an even newer tax act, the Bipartisan Budget Act of 2018. This Act has a number of provisions of interest to elder lawyers.

Extenders

Many tax provisions expired at the end of 2016. The 2018 Act extended many provisions *retroactively* for one year. Note that this Act was signed after some 2017 income tax returns were already filed. Some taxpayers will need to file an amended income tax return in order to take advantage of the extended provisions. Some of the extended provisions of special interest to elder lawyers include:

- Mortgage debt that is cancelled because of the taxpayer's financial condition or because a decline in value of the qualified principal residence is excluded from income tax. There are special rules, including a limit of $2 million of cancellation of debt (COD) income. Note that while this provision expired at the end of 2017, there is an exception if there was a binding written agreement entered into before 2018.
- Qualified Mortgage Insurance Premiums (PMI) can be treated as home mortgage interest if the taxpayer has income no more than $109,000.
- An above the line deduction for up to $4,000 in tuition and fees for qualified higher education expenses. There are income limits.

TAX TIPS

by Michael A. Lampert

Other provisions

A new income tax form! The 2018 Act provides for a new Form 1040 called a Form 1040SR. It is designed for senior citizens age 65 or older by the end of the tax year. While similar to Form 1040EZ, it will not have the EZ form's limit on the amount of taxable income, social security benefits, qualified retirement plan distributions, or investment income. The form should be available for the 2019 tax year.

The new law retroactively extends to Dec. 18, 2019, the ability to apply for a refund beyond the normal statute of limitations for income taxes paid for damages received for a wrongful incarceration.

The rules on hardship withdrawals from retirement plans have been liberalized. For plan years beginning in 2019 (not 2018!), there is an easing of the prior six-month restriction on plan contributions following a hardship withdrawal and the requirement that a loan must first have been made. There is also an expansion of the types of plan contributions allowed to be hardship withdrawn.

continued, next page

Have more information handy when calling the IRS

Many elder lawyers have at some point contacted the IRS on behalf of a client. While it was and is important to have the client present or to have a signed 2848 (IRS power of attorney) or Form 8821 (taxpayer information authorization), now the IRS wants more.

Due to identity theft and privacy concerns, the IRS issued IR-2018-28. It reminds taxpayers and practitioners that when calling the IRS, they need to have available the social security number and date of birth for the taxpayer, filing status, information from the previous year's return (ideally have a copy handy), a copy of the tax return at issue, and any IRS notices or correspondence about the issues. Especially for practitioners, also have information available on the client's name, social security number, tax periods, forms filed, filing status, client's address, and, if applicable, the practitioner's preparer tax identification number (PTIN). For most elder lawyers, it will instead be the "CAF" number (centralized authorization file number) that was issued when a power of attorney was submitted for a taxpayer client. If the attorney does not have one, it will be issued when the IRS power of attorney (Form 2848) is submitted to the IRS. In addition, the IRS representative can now be expected to request the representative's own social security number and date of birth.

Practice tip: The reason for this note is that the elder lawyer who only very occasionally calls the IRS may be surprised by the additional questions before the representative will provide information. Given how long it can take for an IRS representative to actually get on the call, it is helpful to be ready with the answers to the new questions.

***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.*

The Elder Law Task Force . . .
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If you have time and passion, please join the Elder Law Section's legislative committee. It meets year-round and always needs help! If you have a passion for a particular topic, join one of the Elder Law Section's substantive committees. All of the legislation related to elder law is screened through those committees (eldersection.org/committees/).

If you want to help on specific projects, rule challenges, or litigation, contact a member of the Task Force. We always need help. And if you feel like you don't have the time or energy to leap tall buildings or to throw the Lasso of Truth, you can always donate to the Task Force. Donations to the Task Force help pay for our amazing lobbyist, our administrative law attorney, and other gurus we need from time to time (*afela.org/the-florida-joint-public-policy-task-force/*). If you donate to the Task Force, you will also receive updates on the Task Force's many adventures, learning the results sooner than they appear in *The Daily Planet*!

***Twyla Sketchley, Esq., BCS**, is a Florida board certified elder law attorney with The Sketchley Law Firm PA in Tallahassee. She is the immediate past president of the Academy of Florida Elder Law Attorneys, a past chair of the Elder Law Section, and a member of the Task Force since 2009. She is licensed in Florida and Montana.*

Fair Hearings Reported

by Diana Coen Zolner

***Petitioner v. Florida Department of Children and Families,* Appeal No, 17F-05604 (Oct. 25, 2017)**

At issue is whether the department's action denying the petitioner's June 12, 2017, application for Institutional Care Program (ICP) Medicaid benefits is correct. The petitioner has the burden of proof by preponderance of the evidence.

On June 12, 2017, the petitioner's daughter and agent (hereinafter referred to as the POA) filed an application for ICP Medicaid on behalf of the petitioner under his power of attorney. On the application, the POA reported the petitioner's current residential address and listed his mailing address as that of the POA's sister. The POA listed her sister's address as the mailing address because that is where the petitioner had resided prior to entering a facility. In the "Comments After E-Signature" box on the application, the POA indicated that the petitioner had an attorney; however, the attorney's information was never entered in the case record.

On June 14, 2017, the respondent (the department) determined that additional verifications were needed to make an eligibility determination. A notice of case action was sent to the petitioner requesting that pending information be sent to the department by June 26, 2017. No pending notice was sent to the POA or to the petitioner's attorney. The respondent did not receive the pending information by the due date, and the case was processed and denied.

On July 13, 2017, the respondent sent a notice of case action to the petitioner advising him that his Medicaid application was denied because "We did not receive all the information necessary to determine eligibility." No notice was addressed to the POA, and no notice was sent to the attorney.

On July 19, 2017, Aug. 10, 2017, and Aug. 14, 2017, the petitioner's legal representative faxed the pending information to the department.

At the hearing, the POA stated that she had used her sister's address as the petitioner's address because the petitioner previously lived there; however, her sister never told her about the notices being received from the respondent and never forwarded any notices to her. The respondent's witness acknowledged the omission of the petitioner's attorney from the case record, but explained that the "comments" section is not routinely reviewed when applications are being processed. The respondent could not confirm whether any notices were sent to the POA.

The petitioner's attorney argued that he never received any notices from the respondent and that as the petitioner's legal representative, all notices associated with the case should have been sent to him. He only became aware of the denial after checking the petitioner's online account for notices. He further argued that the 60-day rule (stating applications are good for 60 days) should not be applied in this case because the respondent wasted the first 30 days when it failed to send notices to him. The petitioner's legal representative sought ICP Medicaid eligibility beginning with March 2017 (retroactive months included), based on the June 12, 2017, application.

The hearing officer concluded from the evidence presented that the respondent should have sent copies of all notices to the petitioner's legal representative. Without the notices, the petitioner's representative did not know to submit the required information after he had assumed the responsibility to provide information on behalf of the petitioner for the June 12, 2017, application.

Based on the findings of fact, the hearing officer determined that the respondent's denial of the petitioner's June 12, 2017, application for ICP was incorrect and remanded the case to the respondent with an order to implement corrective steps to give the petitioner's legal representative the opportunity to provide any necessary verification to determine eligibility and to protect the June 12, 2017, application date.

***Petitioner v. Florida Department of Children and Families,* Appeal No, 17F-04730 (Sept. 15, 2017)**

At issue is whether the respondent's (the department) action to deny Institutional Care Program (ICP) Medicaid for November 2016 through January 2017 is proper. The petitioner carries the burden of proof by a preponderance of the evidence.

The petitioner was admitted to the nursing facility in August 2016. At that time, the petitioner was incapacitated and did not have a court-appointed guardian. A legal guardian was appointed for the petitioner on June 14, 2017. The petitioner's representative submitted an ICP application for the petitioner on Feb. 13, 2017. The representative made a comment on the application that the petitioner's bank account would show over $8,000 in the account; however, the petitioner's family had written a check to cover her expenses at the facility. On Feb. 15, 2017, the respondent sent a notice of case action requesting proof of the check paid to the facility, among other requests. Based on the information provided, the department approved the application as of February 2017.

continued, next page

Both the department and the petitioner's representative agreed that the petitioner was over the $2,000 asset limit in November 2016, December 2016, and January 2017; however, the petitioner's representative argued that due to the petitioner being legally incapacitated, she was unable to deplete her bank account to meet the $2,000 ICP asset limit, until a guardian was appointed. The petitioner's representative also testified that the petitioner was not and had not been in a coma. The respondent's representative stated that although the petitioner was incapacitated, the funds in the bank were still available to her.

In making her determination, the hearing officer relied on 20 C.F.R. § 416.1210 addressing asset exclusions, 20 C.F.R. § 416.1218 addressing exclusion of automobiles, and Florida Administrative Code R 656A-1.712. The Florida Administrative Code explains exclusions and lists seven permissible exclusions. One of the exclusions listed is for comatose applicants "when there is no known legal guardian or other individual who can access and expend the resources." Based on these authorities, the hearing officer determined that the petitioner was not comatose; therefore, the permissible exclusions did not apply to her. As a result, the petitioner was over the asset limit for November 2016 through January 2017 and the department's action to approve ICP benefits beginning in February 2017 was proper.

***Petitioner v. Florida Department of Children and Families,* Appeal No, 17F-04872 (Sept. 14, 2017)**

The petitioner is appealing the department's action of June 2, 2017, ending the petitioner's Medicaid benefits effective June 30, 2017. The burden of proof was assigned to the petitioner at hearing; however, after further review, it was assigned to the respondent.

Both parties agreed that a lump sum of a sizable amount was received by the petitioner from the U.S. Department of Veterans Affairs (VA) in February 2016. A separate account was created for this lump sum, and the ongoing unearned income from both the Social Security Administration and the VA was assigned to be direct deposited into this account. In May 2017, the petitioner submitted applications for redetermination of HCBS-related Medicaid benefits (Home and Community Based Services), ICP-related benefits (Institutional Care Program), and Medicare Savings Program (MSP) benefits. In June 2017, the respondent denied the above referenced applications because the applicant's "assets were too high for this program."

The value of the assets was not in question. The petitioner's concern was the inclusion of VA income in the eligibility determination. The petitioner considered the lump sum received from the VA as income. The respondent explained that the ongoing VA payments were being treated as income in the budget; however, the respondent also pointed out that the amount identified as Aid and Attendance (A&A) was excluded in the consideration of monthly VA income. The respondent also explained that, pursuant to the policy manual, a lump sum payment is considered income in the month received, but in the month after receipt any portion of the lump sum that remains in the account is counted as an asset.

Based on Federal Regulations at 20 § 416.1121, a veteran's benefits are considered unearned income; however, based on Fla. Admin Code R. § 65A-1.713 (SSI Related Income Eligibility Criteria) and the Department's Program Policy Manual passages 1840.0906 and 1840.0906.02, income from the VA is not counted as unearned income. A&A, unreimbursed medical expenses (UME), and reduced VA pensions are not counted in the eligibility determination budget. On the contrary, VA pensions are included in the monthly budget as income. Therefore, the hearing officer correctly disregarded the petitioner's A&A income and correctly included the petitioner's VA pension income in the eligibility determination.

Furthermore, pursuant to the Policy Manual passage 1840.0906.08, lump sum VA benefits, minus A&A, housebound, and UME, are included as unearned income in the month received. Any balance, including A&A, housebound, and UME, left in the account as of the next month is counted as an asset. Therefore, a distinction is made between income and assets (resources). Income, even income that is not counted in the month of receipt, is counted as an asset when allowed to remain in an account the month after receipt. As a result, the hearing officer concluded that the respondent acted correctly when counting VA income retained in the applicant's bank account after the month of receipt as an asset, and comparing the total accumulated asset against the resource limit.

***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's Office, 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, estates, and guardianships from 2002 to 2008 in Stony Brook, New York. In September 2008, she moved to Florida to enjoy the sunshine and continued to practice in the areas of wills, trusts, and estates. She is a Florida board certified elder law attorney employed with Brandon Family Law Center LLC in Brandon, Fla.*

Summary of selected case law

by Diane Zuckerman

Enforcement of premarital contract/motion to dismiss

Katherine Ann Smith, Appellant / Cross Appellee, v. Douglas W. Smith and E. Drew Mitchell, as Co-Personal Representatives of the Estate of Robert H. Smith, In Re: Estate of Robert H. Smith Appellees / Cross-Appellants, Case No. 1D16-2409 (Nov. 2017)

Issue: Whether a granting of a motion to dismiss and a motion to strike an amended petition as a sham pleading was proper under the specific facts, where the petitioner omitted reference to a premarital agreement in the initial petition, and allegedly did so only to avoid dismissal.

Answer: Yes

The husband and the wife executed a premarital agreement. The terms provided, in consideration of a lump sum distribution to wife, that both agreed "to refrain from any action or proceeding to void or nullify to any extent, the probate of or the terms of any last will and testament or trust or testamentary substitute created by the other, so long as the rights of the surviving party under the terms of this Agreement are not abridged by any such instrument."

The husband died, and the decedent's last will and testament was admitted to probate. The appellees, who were also nominated co-trustees of the decedent's trust, were appointed as co-personal representatives of the estate. The appellant filed a petition seeking to remove co-personal representatives of the estate, alleging a breach of fiduciary duty with regard to the marital trust. The appellant wife argued, unsuccessfully, that the last will admitted to probate was executed after the premarital agreement, and therefore the premarital agreement did not apply. The appellees responded by filing a motion to dismiss based on the waiver in the terms of the premarital agreement language above. The motion was granted with leave to amend.

The appellant then filed a second amended petition, again seeking removal of the co-personal representatives of the estate, but this petition omitted all references to the premarital agreement. The appellees responded by filing another motion to dismiss and a motion to strike as a sham pleading, arguing that the amended pleading purposefully omitted facts related to the premarital agreement to avoid dismissal. The trial court granted the appellees' motions.

In its ruling, the First District applied the principles of contract law, citing *Hahamovitch v. Hahamovitch*, 174 So. 2d. 983 (Fla. 2015) for the proposition that "contract interpretation begins with a review of the plain language of the agreement because the contract language is the best evidence of the parties 'intent at the time of the execution of the contract.'"

The court concluded it was appropriate to dismiss the petition and noted that the appellant did not challenge the ruling in her brief, and thus was prohibited from raising it for the first time in the reply brief. Further, because the clear language of the premarital agreement prohibited a will challenge, the order striking the petition as a sham pleading was within the discretion of the trial court.

Practice tip: This case reminds us once again that pre- and post-marital agreements are enforceable, and will be interpreted pursuant to contract law, with reliance on the plain meaning of the words. As such, legal maneuvering to avoid enforcement of such an agreement in the probate court is likely to be unsuccessful.

An alleged incapacitated person's right to marry

Glenda Martinez Smith, Petitioner, v. J. Alan Smith, Respondent, 224 So.3d 740 (2017), No. SC16-1312, Supreme Court of Florida, Aug. 31, 2017.

Issue: Can a ward who has had his or her right to contract removed enter into a legally enforceable marriage?

Answer: Yes, with court approval.

The Supreme Court determined that the following question was of great public importance and granted the motion to certify the following question:

continued, next page

Case law . . .
from page 23

Where the fundamental right to marry has not been removed from a ward under Section 744.3215(2) (A), Florida Statutes, does the statute require the ward to obtain approval from the court prior to exercising the right to marry, without which approval the marriage is absolutely void, or does such failure render the marriage voidable, as court approval could be conferred after the marriage?

In answering the question, the Supreme Court essentially answered "neither." Rather, the court looked to the guardianship statute, Florida Statutes § 744.3215(2)(a). It concluded that the Legislature had likely intended, in situations when the right to contract has been removed from the ward, but the right to marry has not, then court approval is required to give a marriage its legal effect. Court approval can be given prior to the ward getting married or can be ratified by the court after a ward has married.

Practice tip: In representing an alleged incapacitated person (hereinafter referred to as the AIP), it's important to discuss each of the potential rights that the AIP is in danger of losing. The AIP may be unmarried, but have a committed partner and plan to get married. If the examining committee reports recommend removing the right to marry, then the lawyer should be prepared to introduce evidence that supports the ward's ability to retain this right. If maintained, even though the right to contract has been removed, the ward's marriage can be given its legal effect upon court approval.

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. Diane spent many years as a litigation attorney, and practices trust and estate litigation, guardianship, estate planning, and probate administration.*

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