The Florida Bar

The Elder Law Advocate

www.eldersection.org

Vol. XV, No. 3 *"Serving Florida's Elder Law Practitioners"* Spring 2007

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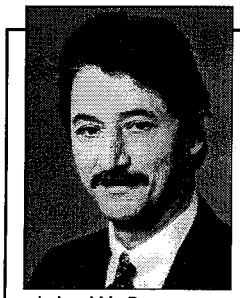
Section Annual Meeting

June 29, 2007
Orlando World Center Marriott
Orlando
Executive Council Meeting,
Awards Luncheon
Committee Meetings

* * *

The long view

Message from the chair



John W. Staunton

I noted in my first message as chair that we were facing the most significant change to Medicaid legislation since 1993, both as individual practitioners and as members of the Elder Law Section (ELS). During the time that I have been privileged to serve as chairman this year, I have witnessed what has largely been a wholesale positive reaction to this change as members have become accustomed to the idea through discussion, seminars, the work of the Joint Public Policy Task Force and perhaps just the passage of time. Regarding the positive reaction I have seen within the organization of the ELS itself, I consider this strength and resilience to be a testament to the legacy of our past leadership. Strong and committed leadership has always been a salient feature of the ELS, and I am pleased to be leaving my tenure as chairman with the knowledge and confidence that we will have strong leadership for years to come.

See "Long view," page 2

Lawyers' Challenge for Children

Make a difference in the life of a child

by Michelle C. Lyles, Assistant Director of Development, The Florida Bar

Despite dramatic growth in the economy, 24 percent of Florida's children still live in poverty according to the *1999 Kids Count* published by the Annie E. Casey Foundation. Half of these children are in homes where incomes are less than 50 percent of the poverty level.

As members of Florida's legal community, you have an opportunity to improve the lives of these children by helping to ensure their legal rights are represented— rights to services these children desperately need if they are to become contributing members of society. You can do this by adding in the $45 suggested contribution to The Florida Bar Foundation on the 2007-08 Bar Fee Statement. These funds will be dedicated by The Florida Bar Foundation for legal assistance to children by legal aid and legal services programs across Florida.

Although there are laws to assist these children, the reality is that without the services of a lawyer and related legal assistance, the future will remain bleak for thousands of Florida's most vulnerable children. For example, even though the law says disabled students should have individualized education plans, poor children are legally entitled to a full-range health examination and related treatment and children in foster care should receive training before they reach the age of 18 to help them live on their own, poor children in Florida are routinely denied their legal rights to these and other essential services.

See "Lawyers' Challenge" page 20

Long view

from page 1

I also noted in my first message that the ELS would be convening a long range planning meeting, and I promised to report the outcome of that meeting. I am proud to report that the meeting was held over a two-day period this spring in Tampa and was facilitated by Professor Rebecca Morgan from Stetson University College of Law. In addition to her skills as a facilitator, Professor Morgan also brought a unique perspective with her since she is among the founding members of the ELS and served as chairwoman in 1994. The meeting was intentionally kept to a workable and effective size, but a number of members outside of the ELS and the Academy of Florida Elder Law Attorneys (AFELA) leadership were also invited to attend.

Not atypical for such a meeting, the session began with an examination of the ELS's strengths and weaknesses. Because some time had passed since the last long range planning meeting, there was also a historical review of how the ELS developed so that the organization's institutional memory would be preserved. During the course of the meeting, the mission statement of the ELS was revised to be more accurate and representative. The revised mission statement was approved by the Executive Committee and will appear on the new ELS website, which has been completed and should be launched by the time this article is published. By the end of the second day, a long range action plan was formulated that addresses the following general areas: leadership; programming; publications; increasing membership; interaction with other organizations; and legislation. For now, I will share just some of the highpoints from the long range action plan.

Leadership. Officers will be identified and elected earlier in the year before the terms of the existing officers have ended. Electing officers earlier will allow for a better coordination of effort during the last few months of the acting officers' terms and will put the incoming officers in a better position to act more efficiently from the beginning of their terms. All of this will provide for better continuity of leadership, both in terms of maximizing everyone's efforts and focusing everyone's sense of purpose. Also, the duties for each of the officer's positions will be realigned to achieve a better and more balanced workload. Leadership will also be strengthened by providing an orientation for Substantive Committee chairpersons as well as a face-to-face planning meeting with the Executive Committee to set an agenda and goals for the upcoming year.

Increasing membership. As part of its goal, the long range plan includes sensitizing the Executive Committee and Substantive Committee chairpersons on an ongoing basis about membership issues generally and reaching out to members in particular. With a goal to increase diversity and to encourage greater involvement, there are plans to follow up with non-renewing members, follow up with seminar attendees and consistently provide information at seminars and other ELS meetings on how to become involved with the section. Reaching out to law school students was also identified as an important way to increase membership. The ELS has already formed a committee for this purpose, and a bylaw change is under consideration that will allow for increased student involvement by creating inducements for students to join.

Programs. The ELS has a number of programs that have proven successful over the years, but an active effort will be implemented to add new programs, new topics and new speakers. The formalities of program organization will also be strengthened together with the formalities of selecting program chairpersons. Program chairpersons will also be better supported by the consistent use of vice chairpersons. Not only does this provide support for the program chairperson, but it also provides training for the vice chairperson, who will assume responsibility as program chairperson the following year.

Legislation and advocacy. One of the most obvious strengths that all attendees recognized is the opportunity the ELS has for advocacy and legislative activity. In conjunction with AFELA, we have spent the past few years successfully building an infrastructure and a funding mechanism for realizing this opportunity. Although the Deficit Reduction Act is still not formally implemented in Florida, it is fair to say we have moved beyond the crisis stage and can begin to think in terms of becoming more proactive. The long range plan includes action steps for increasing our presence before individual county Local Legislative Delegations, supporting and working with AFELA's area representatives and continuing to work with our legislative chairwoman, Ellen Morris, on ways to increase grass-roots advocacy among our members.

The Executive Committee has made a commitment to implement all of the action steps in the long range action plan, but it will take some time to realize fully. The plan will also be modified as it progresses since it will be reviewed and adjusted annually. In addition to changing the election time for officers and reaching out to law students, there are several other bylaw changes that will need to be completed before the long range action plan can move forward on all fronts. For my part, I am grateful to have participated in this planning process and look forward to seeing the ELS continue to grow and to help its members in their efforts to become better attorneys and advocates. Thank you for allowing me to serve you.

Make Plans to Attend!

2007 Annual Florida Bar Convention

- **Friday Dinner & Show With Comedian FRANK CALIENDO**
- **Multiple CLE Seminars for ONE FEE!**
- **Meet with our Supreme Court Justices**
- **Attend the General Assembly**
- **Visit the Lawyers' Marketplace**

June 27 - 30
Orlando World Center Marriott

Elder Law Section Activities
Friday, June 29

Committee Meetings..... 2:30 p.m.– 4:00 p.m.
Executive Council..... 9:00 a.m.–12:00 noon
Member Luncheon..... 12:30 p.m.– 2:00 p.m.

See www.FloridaBar.org for Annual Convention information.

Substantive committees keep you current on practice issues

Join one (or more) today!

Monitoring new developments in the practice of elder law is one of the section's primary functions. The section communicates these developments through the newsletter and roundtable discussions, which generally are held prior to board meetings. Each substantive committee makes a presentation at these roundtable discussions, and members then join in an informal discussion of practice tips and concerns.

All section members are invited to join one or more committees. Committee membership varies from experienced practitioners to novices. There is no limitation on membership, and members can join by simply contacting the substantive committee chair or the section chair.

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Law School Liaison Committee report

by Jason White, Co-chairman

The Elder Law Section is excited to announce the formation of a new committee, the Law School Liaison Committee. Our purpose is to educate the law schools and their students about the Elder Law Section and the practice of elder law. We would like to involve law students and their professors and administrators in the Elder Law Section, and we hope that through this contact with the schools and their students, more people will join and become involved in the section's activities.

The committee is now being formed, and we will be coordinating our first meeting to discuss our objectives. An initial objective is to establish contacts at all of Florida's law schools. Once the contacts are made, we plan to establish relationships and communication with those contacts to develop a plan to accomplish our purpose.

This committee is excited about our goals, and we look forward to helping promote elder law and the Elder Law Section. For more information about this committee, please email Jason White at jwhite@mcelderlaw.com or call 850/784-2599.

Mark your calendar

June 29, 2007

The Elder Law Section
Annual Meeting
Executive Council Meeting,
Awards Luncheon
Committee Meetings
John Staunton, Chairman
Marriott World Center, Orlando

July 5-7, 2007

The Elder Law Section
Annual Retreat
The Breakers, Palm Beach

Stetson announces nation's first online LL.M. degree in elder law beginning fall 2007

Stetson University College of Law is offering the nation's first online LL.M. degree in elder law beginning fall 2007.

The three-semester, 24-credit program allows students to study online at times that are convenient for their schedules. Because this LL.M. program is online, students from around the world can participate.

The LL.M. program is directed by Professor Rebecca Morgan, who leads Stetson's Center for Excellence in Elder Law and holds the Boston Asset Management Faculty Chair in Elder Law, the first elder law chair in the country.

Applicants for admission to the LL.M. program must have received their first law degree from a U.S. law school or from a law school approved by the appropriate authority in a country other than the United States. Foreign applicants must have received a law degree from a law school approved by the appropriate authority in their respective countries.

To learn more about the LL.M. in Elder Law program at Stetson, visit *www.law.stetson.edu/Excellence/elderlaw/LLM/* or contact the Office for International and Cooperative Programs at 727/562-7849 or *elderlaw@law.stetson.edu*.

Call for papers — *Florida Bar Journal*

John Staunton is the contact person for publications for the Executive Council of the Elder Law Section. Please e-mail John at *jstaunton@earthlink.net* for information on submitting elder law articles to *The Florida Bar Journal* for 2007. A summary of the requirements follows:

- Articles submitted for possible publication should be typed on 8 & 1/2 by 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.

The legal question that just never stops: Who pays when there is a life estate?

by Robert M. Morgan

Creating life estates in real property, including homestead real property, whether voluntary or involuntary, can assist in, among other things, estate and long-term care planning as well as probate avoidance. Typically life estates are created by deed or by a defective testamentary conveyance or distribution of homestead real property. If a client has an interest in a life estate as the life tenant or a remainderman, you likely will have run into the following questions:

- Who pays the light bill?
- Who pays for the new roof?
- Who makes the mortgage and tax payments?

Although there is not always an easy answer to some of these questions, the Florida Trust Code does provide some guidance as it relates to the life tenant and the remainderman's interest and their respective obligations. *See* Sections 738.801, 738.701 and 738.702, Florida Statutes.

To assist in responding to this question, the following is a letter our office uses to try to resolve general issues and conflicts as to liability and responsibility for payment because of the creation of a life estate interest in real property. As with any form, this letter is revised to deal with specific issues. I take no pride in authorship and certainly would enjoy any comments that section members have if they believe the letter can be improved.

Dear _____:

This letter discusses the typical liability and responsibility of a life estate tenant. As you are aware, [deceased] provided you with a life estate in [his/her] primary residence at the time of [his/her] death or [a life estate was created and you are the life tenant].

Florida law imposes various rights and obligations upon a life tenant (i.e., you) and the remaindermen (i.e., those who will receive the property after your death or your abandonment of the property). Florida law makes the interest portion (i.e., your portion as the life tenant) responsible for ordinary repairs, recurring expenses and taxes as well as the payment of insurance on the subject property.

All of this is subject to change if there is an agreement between or among the life tenant and the remaindermen; however, such agreement should be in writing and recorded so there are no problems should the property be sold and costs and expenses are to be apportioned.

In the event a mortgage encumbers the property, you will see that Section 738.702(1) (c), Florida Statutes, includes the payment of principal of a mortgage on the life estate as the obligation of the remaindermen and Section 738.701(3), Florida Statutes, makes the interest portion an expense of the life tenant.

If we can provide you with further or more specific information regarding any particular expenses, please advise and we will be happy to do so. Should you wish a copy of these provisions of Florida law, we will be happy to provide them.

Please call with any questions or comments. It is our pleasure to be of service.

If you have any questions or comments regarding this issue, please feel free to contact me at *rmorgan@flfirm.com* or 904/268-7227.

Robert M. Morgan *is partner in charge of the Estate Planning and Elder Law Department of Ford, Bowlus, Duss, Morgan, Kenney, Safer & Hampton PA in Jacksonville, Fla. He earned his undergraduate degree from Arizona State University and his juris doctor from Mississippi College, with distinction. He is the author of numerous articles and seminars on real property, probate and estate planning issues. He is a member of the Florida, Tennessee and Jacksonville Bar Associations; served as chairman of the Probate and Trust Law Section of the Jacksonville Bar; and is an active member of the Elder Law Section of The Florida Bar and the AARP Legal Services Network. He is also a member of the National Academy of Elder Law Attorneys, Academy of Florida Elder Law Attorneys and the Northeast Florida Estate Planning Council. Practice areas include elder law, estate planning and probate, real estate, corporate and business law.*

Elder law and developmental disabilities

by Arlene Lakin

As most of us already know, just because we are *elder* law attorneys does not mean we necessarily limit our practice to seniors only. In fact, many of us not only help individuals of all ages, but we also help persons with developmental disabilities.

Under Florida's statutory scheme, a developmental disability (DD) is limited to only five medical conditions: mental retardation, autism, spina bifida, cerebral palsy and Prader-Willi syndrome (F.S. 393.063/10). Our expertise for these individuals may find its way into guardianship or estate/incapacity planning, whether for the family members (usually the parents) or for the individual with the DD, especially if that individual is capable of executing his or her own legal documents. Sometimes we are called upon to assist in an administrative appeal.

As for public benefits for persons with DD, Florida strictly interprets who is covered under its Medicaid system. Although the state relies in great part on the statutory five conditions described above, conditions such as Asperger's syndrome, which is on the autism spectrum, is specifically excluded as a DD for Medicaid purposes.

When comparing Medicaid for persons with DD versus our classic senior population, there are numerous parallels and differences.

For seniors, the institutional model for nursing home Medicaid is the institutional care program (ICP). For persons with DD, the institutional model is called the intermediate care facility for the mentally retarded (ICF-MR - federal term) or the intermediate care facility for the developmentally disabled (ICF-DD - Florida term). However, whereas seniors are guaranteed a nursing home bed (private pay or Medicaid, if eligible), persons with developmental disabilities are finding less available institutional (or medical model) beds in ICFs, public or private, because the public ICFs are being closed (Landmark closed in Miami two years ago; Gulf Coast Center in Fort Myers is scheduled to close by July 2010) and funding to ICF private providers keeps being reduced or capped.

For seniors, the community model is one of numerous Medicaid waivers (HCBS, Alzheimer's, LTC Diversion, ALE). For persons with DD, the community model is one of few Medicaid waivers (HCBS/DD or FSL). The HCBS/DD waiver is for home services. The FSL (Family & Supported Living waiver) is intended for those persons with DD who are 18 years of age or older, living in their own home or apartment, their family's home or in a supported living situation, but who need ongoing support to live there. There is a cap of $14,792 in 2007 for the FSL waiver. The FSL waiver, nicknamed the "baby" waiver due to its fiscal cap, has been used in recent years to offer families some sort of Medicaid waiver program services while they wait for the "big" waiver, the HCBS/DD waiver, which technically has no funding cap.

Unfortunately, unlike the seniors on Medicaid, persons with DD may wait years to get into the system, even though eligible. Those who are in the system may find their services reduced or terminated due to a finding of "no medical necessity."

Administrative appeals have mostly been for naught since most petitioners have gone before hearing officers who work for the agency against whom they are appealing. However, a recent ruling now requires all appeals against the Agency for Persons with Disabilities (APD) to be heard before an administrative law judge, thereby, it is hoped, increasing a petitioner's odds of success on appeal.

Based on *J.M. v. Florida Agency for Persons with Disabilities* (1st DCA; Opinion 8/8/06, Case No. 1D06-0183; *http://opinions.1dca.org/written/opinions2006/8-08-06/06-0183.pdf),* clear authority has been established for appeals of APD decisions on eligibility and services to be heard by Department of Administrative Hearings (DOAH) administrative law judges instead of by hearing officers. In fact, the APD has issued (Oct. 2006) a revised "Guide to Administrative Hearings," which states:

> In compliance with Chapter 120, Florida Statutes, the APD provides administrative hearings before the DOAH to individuals substantially affected by actions of the Agency. If APD seeks to deny, reduce, terminate, or suspend Medicaid Waiver services, then the hearings are also governed by Federal law (42 CFR, Subpart E). The purpose of the hearing is to provide an opportunity for an impartial, objective review of actions APD takes in the programs it administers.

Deadlines are critical. The APD's new directive states:

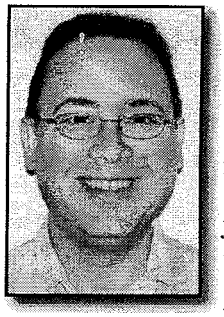
> A request for hearing must be made in writing to the Agency within 30 days of the date the notice of agency action is received. However, if APD has notified you that it intends to reduce, terminate, or suspend Waiver services you are already receiving, you must request a hearing within 10 days in order to continue to receive those services pending a decision after the hearing.

Please be aware of these new deadlines.

Arlene Lakin, Esq., *is a board certified elder law attorney with offices in Margate, Fla. Her law practice focuses on wills, trusts (including special needs trusts), probate and guardianship as well as public benefits, such as Medicaid, Social Security and veterans benefits. She is a member of the National Academy of Elder Law Attorneys, the Academy of Florida Elder Law Attorneys and the Elder Law Section of The Florida Bar; and she also belongs to numerous organizations such as the Broward Coalition on Aging, the Elder Services Resource Network and the Florida Council on Aging. She serves as co-chairwoman of the Broward County Bar Association's Elder Law Section. She is on the Board of Councilors of Nova Southeastern University's College of Dental Medicine. She founded Florida's Voice on Mental Retardation in 1995, a statewide all-volunteer networking and advocacy organization for families.*

Elder law attorneys as first line of defense against consumer fraud

by David H. Abrams



Elder law attorneys are usually all too familiar with the prevalence and effects of consumer fraud upon their clients. However, justice for these clients is often elusive or simply non-existent. The service provided by the elder law attorney is often limited to prevention of future exploitation. State agencies charged with the protection of the elderly are often unable to offer much assistance, and the elder law attorney commonly lacks the experience or resources to offensively pursue the economic criminal. This is exactly the response that dishonest and predatory businesses rely upon as they move from victim to victim.

Consumer protection law is a complicated mélange of state and federal statutes, Federal Trade Commission commentaries, common law and case law. Representing elder clients in consumer actions can be frustrating and disappointing unless the elder law lawyer seeks the proper training and assistance. However, there are both economic and intrinsic rewards for the practitioner who is willing to undertake the challenge of seeking justice for the elderly client.

One common scenario illustrative of these technical challenges is the defense of a home solicitation and improvement foreclosure. Elderly clients are frequently the victims of fraud perpetrated by unethical home improvement contractors who seek to rob Florida elders of their homes through foreclosure scams based upon liens contained within home improvement contracts. For the attorney, defense of these claims can involve a multitude of legal issues and statutory protections, while navigating around their associated exceptions. Defense of a home improvement fraud can involve raising defenses and claims found within the provisions of the Home Ownership Equity Protection Act (HOEPA) (15 U.S.C. §226.31), along with state law defenses and claims brought pursuant to Florida's Home Solicitation statutes (§501.021 Florida Statutes et seq.). Additionally, practitioners should consider whether counterclaims can be brought under Florida's Unfair and Deceptive Trade Practices statutes (§501.201 Florida Statutes), which also include special protections for seniors in §501.2077. A counterclaim of common law fraud, along with punitive damages, may also be possible. Additionally, counterclaims based upon state and federal statutes prohibiting abusive debt collection may also be appropriate. Costs and attorney fees are normally available for a prevailing attorney in an action based upon a consumer protection statute.

Of course, all of this can be very intimidating for practitioners who are unfamiliar with consumer protection statutes or who lack experience with complex civil litigation. However, there is no need to go it alone in seeking economic justice for your elderly client. The National Association of Consumer Advocates (*www.naca.net*) publishes an excellent library of resource materials designed to assist practitioners in pursuing their clients' consumer law claims. In addition, the NACA provides both training opportunities and a referral source to lawyers who specialize in the practice of consumer law.

Elder law attorneys can be a first line of defense for their elderly clients by avenging past consumer frauds by recognizing those wrongs and assisting their clients in asserting their rights to economic justice.

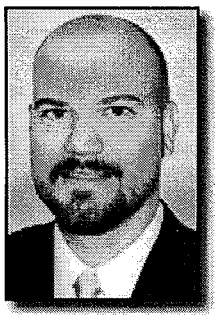
David H. Abrams, *R.N., J.D., is a graduate of City University of New York School of Law, where he completed the school's Elder Law Clinic. Prior to law school he worked as a registered nurse specializing in geriatric and psychiatric nursing. He is experienced as a guardianship examining committee member and as a guardianship attorney. A former assistant public defender, he is in private practice where, in addition to guardianship law, he practices consumer law specializing in representing consumers who have been victimized by predatory lending, debt collection abuse and automobile fraud.*

Our program administrator's newest artwork

Arlee Colman completed this painting of a manatee at the recent "Humanatee" Festival in St. Marks, Florida, to welcome the manatees back to North Florida's waters. The original pastel has been accepted into the Florida State University Museum of Fine Arts Summer Show opening June 8 in Tallahassee.

Processing deaths and custody of remains in Florida

by Nick Weilhammer



Recent high-profile cases highlight issues raised by the procedures we employ in Florida to process and distribute human remains. While some may find a discussion of these procedures unsettling and occasionally morbid, taking away the mystery and disputing multimedia images depicting this process may provide some degree of comfort and guidance to clients interested in addressing the details of their passing, particularly if they suspect a dispute over their remains may arise.

As usual, even though you have passed away, state government gets the last word.

All deaths must be registered. The Department of Health of Florida (DOH) has an Office of Vital Statistics that operates as the central registration system by which the DOH is able to answer all inquiries concerning any death certificate filed. The DOH also tracks this information for legal, social, safety and health research purposes.

The DOH prescribes the death certificate form, which is completed and filed with the local registrar of the district in which the death occurred.

The certificate contains information such as the decedent's Social Security number if available, aliases, place of death and cause of death. Information relating to the cause of death in all death records is confidential.[1] If a probate proceeding is initiated afterward, the cause of death section on the certificate will remain confidential and not open to public inspection. If the death certificate needs to be recorded, it will be recorded with this section deleted or otherwise redacted by the clerk of court.

The death certificate

The registration of the death certificate is the responsibility of the funeral director or other person licensed to dispose of the remains who first assumes custody of the body. If there is none of the above, the physician or other person in attendance at or after the death files the certificate of death.

Personal data is obtained from the next of kin or the best qualified person or source available. To certify the cause of death, the funeral director provides the death certificate to the physician in charge of the decedent's care, the physician in attendance at the time of death or the medical examiner under certain conditions. Within 72 hours, the medical certification of cause of death is certified to the best of the person's knowledge and belief and is furnished to the funeral director.[2]

The funeral director records the facts relative to place of burial or other disposition, signs the record and presents the completed record to the local registrar within five calendar days after death or before final disposition or shipment of the decedent out of state.

The local registrar reviews the death certificate for possible errors and omissions, and if needed, a query is instituted.

The role of the medical examiner

The medical examiner is not involved with every death in Florida. If, for example, a death is solely the result of natural disease and a doctor is available to sign a death certificate, the funeral home or crematory transports the deceased's remains directly to its facility.[3]

The medical examiner is a forensically trained physician who can uncover evidence to explain sudden death or document natural diseases to show that no foul play was involved in the death. The medical examiner's determination is also relied upon by family members, who may use the determination to settle civil disputes, including whether the decedent died by accident, suicide or natural death. In the criminal arena, obviously the medical examiner's opinion helps to resolve issues of guilt or innocence.

Contrary to the exciting depictions on television, most investigations do not involve criminal violence: accidental deaths and natural deaths for which no doctor is available to sign a death certificate make up more than 80 percent of medical examiner investigations.[4]

The case must be referred to the medical examiner of the district in which the death occurred for investigation and determination of the cause of death if the decedent died without medical attendance, or there is reason to believe that the death may have been due to unlawful act or neglect, or the medical examiner otherwise has jurisdiction.[5]

A decedent dies without medical attendance if the death occurred more than 30 days after the decedent was last treated by a physician, except where death was medically expected as certified by an attending physician.[6] If a physician is treating a patient and prescribing prescription(s) for a medical condition, it is assumed the physician is "attending," even though the patient has not been seen by the physician in the last 30 days. In addition, a physician covering for an absent colleague has access to the patient's medical records and can also be considered as attending.[7]

Inspection by the medical examiner

The medical examiner must determine the cause of death and perform examinations, investigations and autopsies as he or she deems necessary or as requested by the state attorney when any person dies under certain circumstances, including by criminal violence, accident, suicide, suddenly when in apparent good health, unattended by a practicing physician or in any suspicious or unusual circumstance.[8] The medical examiner also must determine cause of death if a body is brought into Florida without

proper medical certification.[9] In any of these circumstances, the remains will be brought to the medical examiner for investigation. The medical examiner and an investigator respond to every homicide and suspicious death scene before the body is taken to the office for investigation. Non-suspicious deaths are brought in by transport without scene visitation. Remains may also be brought to the medical examiner in cases where there is a lack of burial funds.

If the body has to be transported to the medical examiner, this usually does not result in delay of disposition of the remains; same-day release is typical. Homicide cases and those requiring legal identification may be delayed until appropriate.

Once the remains are with the medical examiner, whether or not the family will be allowed to view the remains while at the medical examiner's office depends on the local policies of the medical examiner and the facilities available.

Usually family members will have no role or involvement with the medical examiner while he or she undertakes an examination, and a funeral director will take care of the remaining details. However, an investigator may contact family for information concerning the medical history of the deceased, funeral arrangements, date of birth, Social Security number and similar information.

Autopsies

Complete autopsies are performed when, for instance, the death involves or is suspected to involve criminal violence, gunshots, poisoning or suicide, or if the decedent was in police custody or prison.[10] For other deaths that would not normally be investigated by the medical examiner, a family-requested autopsy may be performed if staffing and caseload permit.

If the body has been brought to the medical examiner solely because of a lack of burial funds, an autopsy is not normally performed. In these cases, a family request for an autopsy will be honored.

Autopsy reports are public records, and any person may obtain a free copy on request. They are automatically sent to the state attorney's office, the investigating agency and the hospital (if any) on each case.

Special procedures for cremation or burial at sea

Cremation and burial at sea must be referred to a medical examiner where the death occurred, and authorization must be given. While the investigative process is called "cremation approval," this term is misleading.[11]

The medical examiner reviews the cause of death information to determine if he or she has jurisdiction over the death to perform examinations, investigations or autopsies as appropriate. While the medical examiner may choose to autopsy the body, the investigation is usually by inquiry without examination. The medical examiner inspects the death certificate completed by the attending physician, which can be relied upon by the medical examiner as being true and accurate.[12] If the death does not involve trauma, transportation of the remains is usually not required.

If the medical examiner does not have jurisdiction over the death, cremation will be approved. Any delay in approving cremation is usually the result of a physician-issued death certificate that fails to list an underlying cause of death, not the medical examiner's office.[13] Regardless, by law, remains cannot be cremated until 48 hours after death.[14]

Burial-transmit permit

Before the remains are buried or travel outside of Florida, the local registrar for the DOH issues the burial transit permit authorizing disposition. The application for the burial-transmit permit is usually the DOH's first notification that a death has occurred.[15]

The funeral director (or person licensed to dispose of remains who first assumes custody of remains) applies for and obtains the burial-transit permit within five days after the death occurred or was discovered.[16] A burial-transit permit is not issued until a complete and satisfactory certificate of death has been filed or the applicant provides assurance that one will be registered.[17] A burial-transit permit will also be denied if the death occurred from some disease that is held by the department to be infectious, contagious or communicable and dangerous to the public's health.[18]

Once issued, the funeral director delivers the burial-transit permit to the person in charge of the place of final disposition before interring or otherwise disposing of the body.[19] The permit is then endorsed and sent to the local registrar where the remains are buried.[20] When remains are transported outside of Florida, the burial-transit permit accompanies the remains to its destination.[21]

To bury remains coming from outside Florida, a burial-transit permit issued from the originating state or country is required.[22] If the foreign jurisdiction does not issue burial-transit permits, a certification of a death certificate issued under the jurisdiction is required.[23] The permit or certification must accompany the remains into Florida and constitutes authority for final disposition of the remains.[24]

Articulating wishes for the disposition of remains

As a court noted in a recent, high-profile dispute over the disposition of a person's remains, selecting the resting place of your remains is an issue that is arguably better resolved in private than on Court TV. With proper planning, some of the disputes over a person's remains can be avoided.

Florida recognizes that every competent adult has the right to control the decisions relating to his or her own funeral arrangements. An individual's wishes for the disposition of his or her remains will be given first priority, above all others.[25] As a result, many attorneys appropriately counsel clients to prearrange and prepay for their funeral and/or cremation.

At this time, there is no requirement that the deceased's wishes concerning the method or place of disposal be in writing and formally witnessed in order to be honored. However, relying on oral instructions may result in conflicting interpretations and, as we have recently seen, expensive and embarrassing litigation. Written instructions signed by the decedent can also insulate those acting or relying on a decedent's wishes from liability, such as in cases where the decedent desired cremation.[26]

Instructions regarding disposition of a decedent's remains are frequently included in a person's will. However, the primary purpose of a will is to

continued, next page

Processing deaths

from preceding page

pass *property*, and the decedent's body is not considered "property" or "assets" under Florida law.[27] Therefore, a directive in a will regarding the disposition of a body does not have the same force and effect as the other will provisions disposing of property, and can be altered or cancelled informally.

Due to the mutable nature of an instruction regarding the disposition of remains, the attorney-drafter may find it undesirable to include this instruction in a will to avoid informal edits by the testator. In addition, sometimes the will is not discovered or reviewed until a body has already been disposed of.

So long as the disposition of the decedent's remains is clear and testamentary, there is no legal reason why memorializing a decedent's wishes for his or her remains in a document other than a will, or a separate writing altogether, would not be recognized to memorialize a decedent's wishes as to the disposition of his or her body.

Written instructions should be logistically reasonable and cost-effective. While the selection of a final resting place is obviously a personal decision, it is worth counseling a client that grandiose burial plans may be impossible or impracticable. If the idea of having visitors to the decedent's burial site is appealing, burial in a foreign country may not be ideal given the expenses involved. While unsuccessful, clear burial instructions have been challenged on the grounds that a foreign burial would prevent family members from participating in the decedent's funeral.[28]

If the client has a specific burial site in mind, the client should also be informed as to any burial restrictions on the client, or on any of the client's loved ones that wish to be buried beside him or her, such as certain denominational cemeteries. Trial courts have found ambiguity in otherwise unambiguous instructions when, for example, burial plat restrictions conflict with expressed wishes of the decedent to be buried next to others who are prevented from being so interred.[29]

Anatomical gifts, if partial, should not pose an obstacle to a decedent's expressed wishes for disposition. If an anatomical gift is made of part of the body, the part is removed without unnecessary mutilation upon the death of the donor and before or after embalming. After removal of the part, custody of the remainder of the body vests in the surviving spouse, next of kin or other persons under obligation to dispose of the body.[30] While this class of persons is not expressly prioritized, the expressed wishes should still take precedence over who takes custody of the body.

Providing testamentary disposition instructions of one's body is not a failsafe. Courts have held that even if the written instructions are unambiguous, provisions regarding such instructions are not conclusive of intent. Courts may take evidence that the decedent changed his or her mind regarding the disposition of his or her body. Evidence must be credible to show the decedent changed his or her mind as to the disposition of the body by contrary and convincing oral or written evidence of a change in intent.[31]

Thus, written instructions must also be revisited with frequency. Relying on written instructions highlights the problem of our mobile society: one might live in several states during a lifetime. As a result, written instructions that are not revisited for many years may not reflect the intent of the decedent as to the disposition of his or her remains.

If no written instructions are left, but the decedent's intent is proved by clear and convincing evidence, the decedent's wishes will still be given first priority.[32]

Establishing priorities in the remains if the decedent left no instructions

There is a legitimate claim of entitlement by the next of kin to possession of the remains. If a testamentary disposition of remains is not made, a surviving spouse or next of kin has the right to the possession of the body of a deceased person for the purpose of burial, sepulture or other lawful disposition that he or she may see fit.[33]

Unfortunately, there may be competing interests in the remains. If so, a next of kin may seek possession of the remains by various means, including a petition seeking the release of remains from a medical examiner, a declaratory judgment action or informally asking the medical examiner to release the remains; or the medical examiner or funeral director may seek judicial guidance or approval. These challenges should take place quickly: courts have held that once burial occurs, further judicial challenge for possession of the body is moot, and the courts are usually

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The deadline for the FALL ISSUE is September 15, 2007. Articles on any topic of interest to the practice of elder law should be submitted via e-mail as an attachment in rich text format (RTF) to Patricia I. "Tish" Taylor, Esquire, *pit@mcsumm.com*, or call Arlee Colman at 1-800-342-8060, ext. 5625, for additional information.Arlee Colman at 1-800-342-8060, ext. 5625, for additional information.

persuaded to let the decedent rest in peace.[34]

If a medical examiner or funeral home faces competing challenges to the rights of possession of remains, there is a statutory scheme that prioritizes the various interests and provides clear guidance.[35] Clarity comes at the expense of what may appear to be contrary to a decedent's preference. For example, the statutory scheme would likely favor a lawful spouse, even if the spouses are separated, as the legally authorized person to direct the disposition of the decedent's remains.

Before the statutory priorities are applied, however, it is likely the medical examiner or funeral home will formally need to be a party to any court proceeding. For example, in a recent high profile case, even though the medical examiner was faced with a petition by one party to release the remains and a competing written request for the remains from another party, the court viewed the dispute as one between private parties engaged in a pre-burial dispute and decided to solely rely on the common law.[36]

Invasion of a right to the possession of remains by unlawfully withholding the body from the relative entitled thereto is an actionable wrong for which damages may be recovered.[37] Next of kin have brought actions under intentional tort theories such as tortious interference with a body, outrageous conduct causing severe emotional distress and outrageous conduct and tortious interference with the right of burial. These actions have involved all imaginable (and unimaginable) methods of disposition and handling of remains, such as interference with the handling of cremation, body mutilation, failure to properly dispose of ashes and unauthorized embalming, to name a few.

Acting in the role as counselor, the attorney can use this information to alleviate clients' concerns regarding the treatment of their remains. The chosen method of disposition for the remains should not impact or delay the timing of when a client's wishes are executed. Finally, clients should be encouraged to conduct appropriate planning procedures to provide clear, informative written instructions regarding the disposition of their remains, and revisit such instructions regularly.

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Endnotes:

[1] Fla. Stat. §382.008(6).
[2] Fla. Stat. §382.008(3).
[3] Hillsborough County medical examiner, available at <http://www.hillsboroughcounty.org/medexam/about/faq.cfm>, last visited March 10, 2007.
[4] Hillsborough County medical examiner, available at <http://www.hillsboroughcounty.org/medexam/about/faq.cfm>, last visited March 10, 2007.
[5] Fla. Stat. §382.011(1).
[6] Fla. Stat. §382.011(1); Office of Vital Statistics, Vital Records Registration Handbook at 113 (Rev. A 2006).
[7] Office of Vital Statistics, Vital Records Registration Handbook at 49 (Rev. A 2006).
[8] Fla. Stat. §406.11(1)(a).
[9] Fla. Stat. §406.11(1)(b).
[10] Fla. Admin. Code R. 11G-2.003(3).
[11] Florida Association of Medical Examiners, Practice Guidelines for Florida Medical Examiners, at 1 (2003).
[12] Fla. Admin. Code R. 11G-2.001(3)(a).
[13] Florida Association of Medical Examiners, Practice Guidelines for Florida Medical Examiners, at 1 (2003).
[14] Fla. Stat. §872.03(1).
[15] Office of Vital Statistics, Vital Records Registration Handbook at 79 (Rev. A 2006).
[16] Fla. Stat. §382.006(1).
[17] Fla. Stat. §382.006(2)(a).
[18] Fla. Stat. §382.006(2)(b).
[19] Fla. Stat. §382.006(3).
[20] Office of Vital Statistics, Vital Records Registration Handbook at 79 (Rev. A 2006).
[21] Fla. Stat. §382.006(3).
[22] Fla. Stat. §382.006(4).
[23] Fla. Stat. §382.006(4).
[24] Fla. Stat. §382.006(4).
[25] *Arthur v. Milstein*, 2007 Fla. App. LEXIS 2842 (Fla. 4th D.C.A. Feb. 28, 2007); *Cohen v. Guardianship of Cohen*, 896 So.2d 950, 954 (Fla. 4th D.C.A. 2005).
[26] Fla. Stat. §732.804.
[27] *Cohen v. Guardianship of Cohen*, 896 So.2d 950, 954 (Fla. 4th D.C.A. 2005).
[28] Petitioner's Emergency Petition for Writ of Certiorari, *Arthur v. Milstein*, Case No. 07-00824 (Fla. 4th D.C.A. Feb. 26, 2007).
[29] *Cohen v. Guardianship of Cohen*, 896 So.2d 950, 952 (Fla. 4th D.C.A. 2005).
[30] Fla. Stat. §765.517.
[31] *Cohen v. Guardianship of Cohen*, 896 So.2d 950, 955 (Fla. 4th D.C.A. 2005).
[32] *Arthur v. Milstein*, 2007 Fla. App. LEXIS 2842, *8 (Fla. 4th D.C.A. Feb. 28, 2007; *Cohen v. Guardianship of Cohen*, 896 So.2d 950, 954 (Fla. 4th D.C.A. 2005).
[33] *Kirksey v. Jernigan*, 45 So.2d 188, 189 (Fla. 1950).
[34] *Leadingham v. Wallace*, 691 So.2d 1162, 1163 (Fla. 5th D.C.A. 1997).
[35] See, e.g., Fla. Stat. §406.50(4); Fla. Stat. §497.005(37); Fla. Stat. §497.152(8)(c).
[36] *Arthur v. Milstein*, 2007 Fla. App. LEXIS 2842 (Fla. 4th D.C.A. Feb. 28, 2007).
[37] *Kirksey v. Jernigan*, 45 So.2d 188, 190 (Fla. 1950).

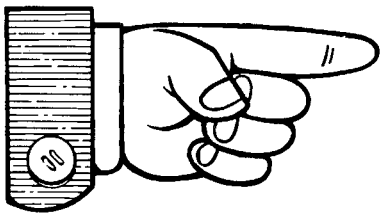
What would YOU do?

Question 1: *I represent a husband and wife where wife needs Medicaid Institutional Care benefits. Wife is 60 and receiving SSDI. Husband is 63 and works full time. Husband has an IRA ($11,000) and a 401K ($100,000). He is old enough to begin withdrawing minimum distributions from both without penalty but has not because he is still working. Would husband's IRA and/or 401K be considered countable assets? If countable, and if he were to start taking minimum distributions on a monthly basis, would that change the outcome?*

Question 2: *In long-term care Medicaid diversion, what would happen if applicant's income was enough to meet the room and board rate of contractor for an assisted living facility but then community spouse had assisted living facility spouse's income diverted to him/her, leaving no money to pay for room and board at assisted living facility? Does this effectively mean the person would have to go into a skilled nursing facility?*

Question 3: *I am opening my own practice after several years in public service. I am looking for an assistant but have very little experience screening and/or interviewing candidates. Do you have any tips on what to look for in a good assistant for an elder law practice?*

Question 4: *I recently had a client ask me to assist in estate planning for her second marriage. She is a widow with adult children from her first marriage, marrying a widower with adult children from his first marriage. They both have homes and other real property. He has about $300,000 more than she does in total assets, and he has some serious health problems that could eventually lead to his need for skilled nursing care. His longtime attorney is drafting a prenuptial agreement. What kinds of protections does my client need in that agreement and what additional estate planning tools should she consider?*



I've got this case ...

by Twyla Sketchley

Question 5: *I am involved in a litigated incapacity proceeding, and opposing counsel is objecting to everything. Are the examining committee reports hearsay? What about the information (medical records, comments by caregivers, etc.) contained therein?*

Question 6: *I represent the guardian of an elderly man who is in a skilled nursing facility and needs to apply for Medicaid Institutional Care Program (ICP). The man is married to his third wife, who is under guardianship in another state. The man has no property other than his checking account in his name, and the guardian believes that the wife has property in excess of $200,000, representing the sale of the home in which the husband and wife lived prior to her relocation. The wife's guardian refuses to cooperate in any way. How do I get him eligible for Medicaid ICP?*

Now it is your turn to share your knowledge, experience and solutions. Responsive articles should be submitted in Word (.doc) or rich text format (.rtf) and can be emailed to me at *twyla@sketchleylaw.com*.

If you have questions you would like to submit for the next issue, please email them to me at *twyla@sketchleylaw.com*. All questions will be published anonymously unless you specify otherwise and may be edited for content and clarity.

Twyla Sketchley *is the managing attorney of The Sketchley Law Firm PA in Tallahassee, Fla. Among many things, she is a member of the Elder Law Section and co-chairwoman of the section's Guardianship Committee.*

Tips for hiring a good assistant

by Twyla Sketchley

The column "I've Got This Case..." posed the following question:

Question: I am opening my own practice after several years in public service. I am looking for an assistant but have very little experience screening and/or interviewing candidates. Do you have any tips on what to look for in a good assistant for an elder law practice?

Answer: Before determining what a good assistant is, you must know what you want in an assistant. In addition to having the ability to type, count and alphabetize, this author looks for candidates who are organized, self-directed, caring, outgoing and creative with a pleasant personality. This author takes the position that her assistant reflects the standards of her practice and expects as much from her employees.

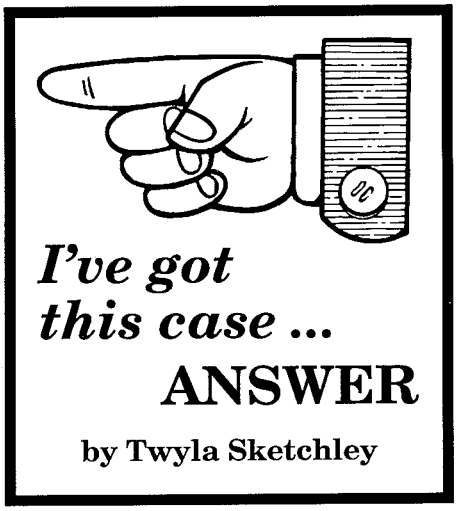
First, create a job description with your preferred method of application (resume, cover letter, application, etc.). A good job description helps determine the qualities you need, advertise the position, screen candidates and even evaluate a new employee's performance.

Post the job description to reach candidates with the qualifications you seek. For example, you might find candidates with paralegal training or aging resources knowledge by posting through a local university's paralegal studies or social work program. Another good source is word of mouth. Ask members of your local bar association, church or civic club to refer candidates. Internet job search sites can be a source, but know the site's target audience.

Next, screen the potential applicants' resumes, cover letters or applications to determine whom you want to meet. You are looking for candidates that followed your application instructions, have error free applications or resumes and possess the basic qualifications. You are also looking for candidates with stable job histories (no more than one job per year). Beware of resumes that appear "padded."

Once you decide which applicants you wish to interview, develop interview questions. A set of interview questions guides the interview, limits its length, keeps you from asking illegal questions and helps ensure each candidate is judged by the same standard. Ultimately you are looking for a qualified candidate you can work with, one who follows instructions, has initiative and will treat you and your clients with respect.

A few good interview questions are:



What do you know about elder law? The answer indicates how much research or experience the candidates have with elder law and how much they have to learn.

What experiences have you had with elderly or disabled individuals? The answer tells you whether candidates understand the difficulties your clients may have dealing with your office. The use of words like crone, hag, fogy, geezer, gomer, etc., indicates they might lack the level of respect and tolerance your clients might expect.

What has been your experience with lawyers and the legal system? The answer reveals whether the candidate has a negative view of lawyers or the legal system. Do you want to work with someone who dislikes your profession?

What do you believe will be your role as assistant? This answer shows whether candidates actually read your job description. You want them to be able to read ...

What's your favorite television show and why? The answer to this or similar questions tells you what kind of interests the candidate has and whether those interests are compatible with your personality. Do you want an assistant whose favorite show is *Access Hollywood* because she can keep up with Paris Hilton's latest exploits?

Define chronological order. This and answers to similar questions determine whether the candidate has the basic knowledge required for filing. Hiring a candidate who cannot answer this question reflects your willingness to do ALL of the filing.

Describe your typical Saturday routine. This answer helps you get to know candidates and establish rapport. It reflects how candidates feel about the possibility of working on Saturday and if they have a weekend hobby affecting Monday morning punctuality.

What are three ways you could learn how to do things in an office? This evaluates the candidates' deductive reasoning and ability to solve problems without assistance. It will also tell you how much hands-on direction they will need. "Ask the attorney" is not the best answer.

Describe what you liked least about your last job and supervisor. This answer shows whether candidates can give reasonable and appropriate criticism, the level of professionalism they present in uncomfortable situations and how they feel about their job duties. "Answering the phones" and "The office was full of hags" are examples of interview terminators.

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You might consider requiring candidates to complete short tasks evaluating their basic abilities. Examples include alphabetizing documents, short writing samples or simple math tests. If you are uncomfortable creating your own, an Internet search will provide many ideas.

Finally, take a few days to think about your candidates' answers. Review any notes you took to determine which candidate fits your practice best. This author evaluates by using several criteria that are assigned points, including points for personality and salary requirements. This is also the best time to contact references and former employers and to review your local court docket for legal actions (criminal or civil) in which candidates are involved.

Choose the candidate that you can afford, who meets the most criteria and who appears to have the greatest stability. Always remember, your assistant is the first voice your clients hear and the first face they see. You want your assistant to reflect the standards of excellence you set for your practice.

Simple homestead waivers
Is there such a thing?

Tips & Tales

A. Stephen Kotler

This is my first column as the writer of Nicola Boone's Tip and Tale. I say it is her column because I have not earned the ownership rights and am currently a tenant or guest. Moreover, as some of you know, I am primarily a trusts and estate and tax attorney and consider myself an "elder lawyer light." Not knowing where my material would come from, I was quite hesitant to try to fill such big shoes of the departing columnist, but lucky for me she said I could write about anything ... "that has to do with elder law from ethics, probate, guardianship, real estate general transactions, EP, tax, Medicaid, Medicare— whatever strikes your fancy."

I had been all set on the first topic for months, but the day before the submission deadline, something else struck my fancy: homestead waivers. A thread appeared on the ABA-PTL list entitled, "Florida Homestead—Postnuptial Agreements." Next thing you know the thread is 20 posts deep with RPPTLs more famous than Godzilla coming out of lurker mode to opine on a topic that has profound implications, the waiver of statutory and constitutional rights, but could get as little actual press as two sentences in a ladybird deed. Equally important were the ethical issues and professional liability issues raised by the many posters.

A typical example of a postnuptial agreement in the elder law world would be a waiver of homestead and possibly elective share in an enhanced life estate deed. The language may be something similar to this: "By execution of this deed, the Grantor irrevocably waives, releases and renounces any and all rights of marital election and/or homestead which he could have or enjoy by reason of him surviving his spouse." The deed may also further recite the grantor's grant of a power of attorney to an individual for the purpose of effectuating such waiver. It is not atypical in an elder law practice to resort to the use of a durable power of attorney to get things done. So at this point, there is a postnuptial agreement that may have been executed by an attorney in fact.

For a "full-blown" postnuptial, one would demand separate counsel and exhaustive financial disclosure, but is there a "mini" postnuptial that is still valid yet requires less involvement?

According to the Florida Bar Treatise, *Drafting Marriage Contracts in Florida*, nuptial agreements are valid if:

A. The agreement either had to be (i) fair and reasonable for the wife, or (ii) the husband had to make a full and frank disclosure of his net worth or the wife had to have a general and approximate knowledge of the financial condition of the husband. *DelVecchio*.

B. Wife must also have knowledge of husband's income. *Cladis*.

C. The contract must be entered into freely and voluntarily. *Potter v. Collin*.

D. Lack of independent counsel did not in and of itself vitiate an agreement. *Posner*.

Theoretically, separate counsel is not a requirement (although Section 2.6 of the treatise says "it is absolutely clear that one attorney cannot represent both parties to an antenuptial agreement because of the parties' adverse interests. Rule Reg. Fla Bar 4-1.7"). Next, section 732.702, Florida Statutes, requires "fair disclosure" for postnuptial agreements and no disclosure for premarital waivers. Theoretically, all that is needed for a financial disclosure to be "adequate" is that the other party has a proximate knowledge of the assets, debts and income of the other while being given an opportunity to explore any financial matter as the party deems necessary. It would seem that most long-term married couples can meet the disclosure test

pretty easily. However, who is signing the waiver and if not the principal himself or herself, under what authority?

Our friends at The Fund state that a postnuptial agreement cannot not be relied upon without judicial determination. TN 16.04.14. Thus, we should advise our clients that probate will be necessary for the limited purpose of confirming the agreement, which could come in the form of an Order Determining Homestead Status. Unfortunately, clients have been bombarded with the marketing message that probate is evil and only makes lawyers rich, so get a trust. The Fund's mandate would seem to mean that the homestead order should recite the agreement in question is a valid waiver. Moreover, to get that order, your petition would have to include the facts regarding the waiver, and it is this writer's practice to attach a copy of the agreement (or at least the portion with the waiver) to the petition. Finally, you must serve interested persons (including those who would take if the waiver were invalid) who may be disgruntled, disinherited persons. In other words, the child who was not a remainder person of the enhanced life estate deed. See Rohan Kelly's form of petition and order in Chapter 19 of the Florida Bar Treatise, *Practice Under the Florida Probate Code.*

Now we are at the real issue: Who has standing to object to the waiver and on what grounds? That will be addressed in a roundabout way. Can you represent both sides of a nuptial agreement and not provide full financial disclosure to boot? While your husband and wife clients might not care, what if the rights of a child (for example) are impaired as a result of the plan? Might the child challenge the homestead petition and make a claim the agreement (waiver) was not valid? And if so, would the mutual representation and lack of evidence of financial disclosure leave the document exposed to such an argument? And then, will all eyes be on you for preparing it?

Most practitioners believe that with appropriate disclosure, knowledge and consent, an enforceable waiver can be prepared by one lawyer without each spouse having separate counsel. When the clients have common goals and objectives, you have discussed the inherent conflict between the duty of loyalty and duty of confidentiality that occurs in a joint representation scenario and the clients have consented to such dual representation, I would think most attorneys would feel O.K.

However, as one poster said, "I would never do that myself. ... If there is anyone who wants to second guess the waiver, I am liable to become a target. ... If you want to take on that risk, then you should be compensated for it, and the clients who really need these kinds of waivers can't afford to pay the kind of fees that will compensate you for taking on that risk. If you have other clients who can pay your fees without you having to assume this higher level of contingent risk, then why would you choose instead to earn fees that carry inherent higher risk with them? ... I have always referred at least one of the spouses to another lawyer in those situations where we had to have a homestead waiver." As the saying goes, that's a good job if you can get it.

While many of our clients simply cannot afford such luxuries (in the clients' eyes) as dual representation, their economic situation does not abrogate their rights or our duties. So, it would appear that the cautious lawyer trying to protect himself while doing the client's bidding would get written consent to dual representation with appropriate waivers of conflict and duties in order to be able to draft the enhanced life estate deed with homestead waiver. Who is signing off on that, the principal or the agent?

The same poster continued, "to me, the more serious question is whether I can represent one of the two spouses in effectuating the waiver, and then resume representation of both spouses once the waiver has been put in place. Do I have to refer both spouses out to deal with the waiver, so that I never represent either of them separately?"

Is there a simple homestead waiver? The document (what the client sees) can indeed be simple. The analysis, planning and world revolving around the document (what the client does not see) are actually very complex.

A. Stephen Kotler *is with Wollman Gehrke & Solomon PA in Naples, Fla. He maintains a practice in the areas of comprehensive wealth transfer planning, related income tax issues, asset preservation, probate, trust administration, federal transfer tax and long-term care planning. Mr. Kotler is AV rated, received his JD from Emory Law School and has an LLM in estate planning from the University of Miami.*

Summary of selected caselaw

by Nicholas J. Weilhammer

Fletcher v. Huntington Place Limited Partnership, 32 Fla. L. Weekly D 863 (Fla. 5th D.C.A. Mar. 30, 2007).

Personal representative appeals an order compelling arbitration of her claim against former facility of decedent.

The inclusion of certain provisions in the ADR Service Rules of Procedure for Arbitration of the American Health Lawyers Association were void as against public policy because they had the effect of superseding or dismantling the protections afforded patients by the Legislature in the Nursing Home Resident's Act, Chapter 400, Florida Statutes (2005).

Regarding severability, the arbitration agreement reflects an intent that the parties arbitrate specifically with the AHLA. The lower court does not have to remake facility's agreement to excise the offending provisions. Given the nature of the relationship between a nursing home and its patient, the courts ought to expect nursing homes to proffer form contracts that fully comply with Chapter 400, not to revise them when they are challenged to make them compliant. Otherwise, nursing homes have no incentive to proffer a fair form agreement.

The manner of execution of the arbitration agreement by the appellant precluded its enforcement. The admissions agreement, which contains the arbitration agreement, indicated that appellant did not sign the agreement in her capacity as her mother's representative. She signed the document only in the space after the provision: "If someone controls funds or assets that can be used to pay the resident's charges and wants to receive financial notices, that person should sign as agent." Trial court erred in compelling arbitration.

Alterra Heathcare Corp. v. Estate of Linton, 32 Fla. L. Weekly D 574 (Fla. 1st D.C.A. Feb. 28, 2007).

Estate brought action against ALF for negligence and statutory violations of the FNHRA. ALF moved for arbitration. Estate argued decedent never signed the residency agreement, and her son, who did sign the agreement, had no authority to do so.

Lower court compelled arbitration but ruled the provisions that limited punitive and compensatory damages were void and unenforceable as against the public policy reflected in the NHRA.

Arbitration agreements eliminating punitive damages and capping noneconomic damages defeat the remedial purpose of the NHRA and are therefore void as against public policy. Resident was an intended third-party beneficiary of the agreement, and a nonsignatory third-party beneficiary is bound by the terms of a contract containing an arbitration clause.

Cutler v. Cutler, 32 Fla. L. Weekly D 583 (Fla. 3d D.C.A. Feb. 28, 2007).

Decedent deeded property to trust, reserving a life estate in home and devising home to daughter and vacant lot to son upon her death. Decedent planned that if other available assets were insufficient to satisfy her creditors' claims and the final expenses of her estate, the residence and the adjacent parcel she devised to her son would abate equally to satisfy those expenses.

Decedent had a life estate in the residence property and occupied it continuously before her death pursuant to the right provided to her in the irrevocable land trust and was an "owner" of her residence for purposes of devising the homestead protection on that residence on her death. It was immaterial that legal title to the residence was held in an irrevocable trust during decedent's lifetime. The conveyance to daughter fulfilled all of the legal requirements entitling her to claim that it is "protected homestead" to her.

Even though decedent expressed contrary desire, a person cannot dispose of her property as she pleases if contrary to law or public policy. While the decedent had the right to subject the devise of the vacant lot to the debts of the estate, the homestead devise to her daughter was followed by a constitutional exemption from forced sale of her devise to satisfy the expenses of decedent's estate. This constitutionally created benefit is personal to the daughter, and hers to assert. Upon the death of decedent, "protected homestead" passed outside the estate. Court affirmed that specific devise was protected homestead property not subject to invasion for the payment of estate expenses.

Hernandez v. Gil, 32 Fla. L. Weekly D 451 (Fla. 3d D.C.A. Feb. 14, 2007).

Settlement agreement specified that, in exchange for certain real and personal property, appellant agreed to exchange general releases with the parties and to dismiss a petition he had previously filed objecting to the probate of his father's will. In the first release appellant agreed to release his mother from any and all causes of action and to renounce any right, except to the extent, if any, that she named him a beneficiary under her will.

If not named as a beneficiary under his mother's will, appellant agreed not to contest the validity of the will and waived his right to enter an appearance in any probate proceeding pertaining to his mother's estate and, to the extent that he would make such challenge or enter any such appearance, he would be deemed to have predeceased his mother.

Appellant also agreed to release appellee individually and as personal representative of his father's estate from all past, present and future claims. The trial court approved the settlement agreement and reserved jurisdiction to enforce its terms. The mother died and did not name appellant a beneficiary in her will. Contrary to the settlement agreement, appellant filed a petition challenging administration of her will. Appellant filed a lawsuit against the personal representative for tortious interference with his rights to his mother's inheritance.

Appellant bargained away his right to challenge his mother's will and in the event that he did so, he would be deemed to have predeceased his mother. Having challenged his

mother's will, appellant was deemed to have predeceased her and, therefore, had no right to any inheritance from his mother. Order enforcing settlement agreement was affirmed.

Juega v. Davidson, 32 Fla. L. Weekly D 451 (Fla. 3d Feb. 14, 2007).

Estate proceedings began in Spain. Estate closed and estate administrator was discharged. Administrator then filed an amended complaint for conversion and civil theft. Lawsuit was not listed as an estate asset. The sole heir agreed that former estate administrator was pursuing the litigation for the heir's benefit.

Estate administrator ceased to act in his representative capacity and did not have standing to raise claims on behalf of the estate. The estate was no longer the real party in interest; the sole heir was. Order dismissing former estate administrator affirmed for lack of standing.

Disque v. Unger, 32 Fla. L. Weekly D 233 (Fla. 4th D.C.A. Jan. 17, 2007).

Couple dissolved marriage and executed a property settlement agreement requiring husband to leave portion of his estate to their two children "and/or any of their issue." After wife died, a question arose as to the interpretation of this language, and wife's estate filed a complaint in the probate court for declaratory relief to determine whether the estate was obligated to enforce the agreement. When the probate court realized that wife's estate had no financial interest in the dispute, it *sua sponte* dismissed the action.

A personal representative is a fiduciary who shall observe the standards of care applicable to trustees. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of the decedent's will and this code as expeditiously and efficiently as is consistent with the best interests of the estate. A personal representative shall use the authority conferred by the Probate Code, the authority in the will, if any, and the authority of any order of the court, for the best interest of interested persons, including creditors. Resolution of the dispute would be of no financial benefit to the estate.

The fact that the estate was authorized by the property settlement agreement to enforce it, however, does not satisfy the requirement of Section 733.602(1), that the personal representative act in the best interest of interested persons. The persons interested in the estate, beneficiaries or creditors, have no interest in the dispute involving the will.

When the personal representative found himself in a quandary as to whether to file the lawsuit, he should have sought court approval before filing the lawsuit, as is authorized by Section 733.603, Florida Statutes. When the trial court concluded that pursuing litigation was not in the best interest of the estate, it was simply doing what was contemplated by Section 733.603. Because it was undisputed that the estate could not benefit financially, and that further litigation would deplete the assets that would otherwise go to interested persons, dismissal of the declaratory action was affirmed.

Harding v. Rosoff, 951 So. 2d 912 (Fla. 4th D.C.A. 2007).

In testamentary trust created by will of brother, sister is given power of appointment to dispose of the assets in the trust in her will. She purports to exercise the power of appointment, but did not do so in her most recent will as required by the trust. Her nephew and Merrill Lynch were appointed as personal representatives of her estate. Sister's exercise of the power of appointment in her last will was successfully challenged by appellant. (Personal representatives unsuccessfully argued that under the theory of dependent relative revocation, if the most recent will had not been effective to exercise the power of appointment, a prior will should have been given effect). Lower court then rejected appellant's claim that the personal representatives should be surcharged for the 25-percent decline in value of the assets during the delay caused by the litigation, arguing that but for the delay, appellant would have received the assets from the trust earlier and converted them into treasury bonds.

The pursuance of the litigation by the personal representatives was consistent with the testator's intent, and there was no impropriety by the personal representatives. There was no support for the theory there was a benefit to the *estate*, under the specific facts, supporting an award of attorney's fees and costs. This litigation thwarted the testator's intent and only determined who would be the beneficiary of a trust. Lower court's denial of surcharge and attorney's fees affirmed.

In re: Estate of Coukos, 947 So. 2d 1290 (Fla. 2d D.C.A. 2007).

Decedent's grandchildren and great-grandchildren did not have standing to file petition for revocation of probate, challenging decedent's will, when previous and presumptively valid wills had been discovered that, similar to the current will, did not include them as beneficiaries of the estate.

Simpson v. In re Estate of Roosevelt Norton, 949 So. 2d 262 (Fla. 3d D.C.A. 2007).

Property of estate needed to be sold, and appellant had been granted a right of first refusal on the property. The court appointed a Realtor® who listed the property and received offers on the property. Appellant was given numerous opportunities to exercise her right of first refusal. However, she refused to either match the buyer's offer or to cooperate in completing the sale to the buyer, contending the purchase price of the property approved by the court exceeded the "fair market value" of the property given the property's state of disrepair. The personal representative was forced to obtain a court order mandating that appellant exercise her right of first refusal within 10 days. Court held the trial court is not bound to authorize a sale of the property at a "fair market value" that is less than what prospective buyers are willing to pay. Trial court and the personal representative have the obligation to maximize the value of the estate's assets so that estate creditors can be paid.

Hernandez v. Hernandez, 946 So. 2d 124 (Fla. 5th D.C.A. 2007).

Son appealed order not appointing him personal representative of his father's estate, although he was named in his father's will. Instead, court appointed unrelated attorney as personal representative based on animosity between son and his brother.

Where a dispute will cause unnecessary litigation and impede the

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Case law
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estate's administration, and either the person lacks the character, ability and experience to serve or exceptional circumstances exist, the totality of circumstances may permit the court to refuse to appoint the personal representative named in the will. Exceptional circumstances may include those in which unforeseen circumstances arise that clearly would have affected the testator's decision had he been aware of such circumstances, but the testator had no reasonable opportunity prior to his death to change the designation of the personal representative in his will. The preferred personal representative may be considered unsuitable to administer the estate if there is an adverse interest of some kind, hostility to those immediately interested in the estate or an interest adverse to the estate itself.

Trial court did not detail the facts that would support the denial of appellant's petition for administration, but referred only to the brothers' conflict as its basis for declining to appoint either as personal representative. Trial courts do not have discretion to refuse to appoint the personal representative named by the testator in the will unless that person is disqualified by law. The testator's selection of a personal representative should be afforded great deference. Only in exceptional circumstances does a court have the discretion to refuse to appoint a person as personal representative who was named in the decedent's will. Here, the brothers' dispute was acrimonious, but unremarkable. There is no record evidence that appellant did not meet the statutory criteria to serve as the personal representative. He is an Ohio attorney and has been diligently determining the estate's assets and liabilities. A dispute between the estate's beneficiaries, without more, does not constitute sufficient grounds to refuse to appoint an otherwise qualified person named as personal representative in the decedent's will.

EHQF Trust v. S&A Capital Partners, Inc., 947 So. 2d 606 (Fla. 4th D.C.A. 2007).

A trustee cannot appear *pro se* on behalf of the trust, because the trustee represents the interests of others and would therefore be engaged in the unauthorized practice of law.

Arthur v. Milstein, 949 So. 2d 1163 (Fla. 4th D.C.A. 2007).

Mother of decedent challenged order granting decedent's daughter's motion to recognize daughter's sole right to determine the disposition of decedent's remains and the related ruling directing that the guardian ad litem direct all aspects with respect to the handling of those remains consistent with the best interest of that child.

In the absence of a testamentary disposition, the spouse of the deceased or the next of kin has the right to the possession of the body for burial or other lawful disposition. A written testamentary disposition is not conclusive of the decedent's intent if it can be shown by clear and convincing evidence that she intended another disposition for her body. A testamentary disposition will not be upheld when credible evidence has been introduced to show that the testator changed her mind as to the disposition of her body. The last ascertainable wish of the decedent with respect to the disposition of her remains was that she be buried in the Bahamas next to her son. The guardian ad litem represented that he is committed to a burial in accordance with the decedent's wishes; therefore, there was no need to remand the case.

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Lawyers' Challenge
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For the past several years, The Florida Bar Foundation has funded special annual grants for legal representation of children. Through your generous donation, Legal Aid has been able to help children like Henry.

Henry, age 12, has autism and loves going to school. He has uncontrollable body movements and is over stimulated by noises and by any changes in his scheduled routine. For his safety, Henry's school is required to transport him from his front door at home to the classroom door at school so he does not run out to the road and hurt himself. When Henry and his mother moved to a new home, the school district refused to continue picking Henry up at his doorstep because he does not use a wheelchair. Legal Aid worked with the Center for Autism Related Disorders to persuade the school district of the danger of allowing Henry to catch the bus at the bus stop. Thanks to the generous support of those who took to heart the Lawyers' Challenge for Children, the school finally agreed to implement Henry's Individual Education Plan initially approved by the school, and the youngster was able to return to school.

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As lawyers, you know the law is a tremendous tool for improving your clients' lives— for protecting their rights and pursuing justice. Please join other Florida lawyers in making this $45 charitable contribution to The Florida Bar Foundation. Let's bring the benefits of the law and of lawyers to the lives of poor children in Florida.

Fair hearings reported

by Nicholas J. Weilhammer

Petitioner v. Florida Department of Children & Families, Appeal No. 06F-03509 (Dist. 13 Hernando, Unit 88691 Sept. 5, 2006).

Petitioner, living at a nursing facility, applied for ICP Medicaid benefits in December 2005. Petitioner's income exceeded the income limit. The proposed guardian of petitioner obtained a court order in February 2006 authorizing her to create a qualified income trust to maintain petitioner's eligibility. The order authorized proposed guardian to name herself as "trustee/settler" of the trust. An irrevocable QIT, drafted by an attorney, was established in February 2006. Trustee was appointed plenary guardian in March 2006. Petitioner's income was reduced below the income standard for February-April 2006. DCF district legal counsel found the trust to be invalid because the trustee was not the petitioner's legal guardian at the time she executed the trust in February 2006. In May 2006, the circuit court ratified petitioner's QIT, and district legal approved the income trust as a result of the order. Petitioner was approved for ICP benefits effective May 2006.

The February order gave the authority to create a QIT for the petitioner. At the time of execution, the trustee had the authority to execute the trust and had the legal authority to act in place of the petitioner. Therefore, the trust met the income trust requirements. Appeal granted.

Petitioner v. Florida Department of Children & Families, Appeal No. 06F-2241 (Dist. 13 Citrus, Unit 88997 Sept. 12, 2006).

Petitioner appealed denial of application for ICP benefits based on excess income and assets for August-November 2005. Petitioner resided at nursing facility, was disabled and under 65. In May 2005, a QIT was established. District legal counsel did not approve the trust because the trustee could distribute income to pay for the expenses of maintaining the trust and other expenses that would decrease the amount of the trust due to Florida at the time of petitioner's death. DCF agreed that if this provision were deleted by amendment, the amendment would be considered effective retroactively to the date the trust was created (May 2005). Petitioner executed an amendment to the QIT in August 2006 deleting the offending trust language.

In May 2004, an irrevocable supplemental needs trust was established. The property in the trust exceeded the asset limit for the ICP program. District legal counsel did not approve the trust because there was a voluntary conservator; therefore, petitioner retained the ability to revoke her authority. The property of the trust was considered an available asset. In March 2006, DCF denied petitioner's application for ICP program benefits based on excess income and assets.

Regarding the QIT, DCF agreed to make the amendment to the trust retroactive to the date the trust was established. Based upon this stipulation, the QIT meets all requirements. The amount of income deposited has not been established; therefore, DCF must provide the opportunity to verify the amount of his income that was deposited into the trust each month effective August 2005 and determine whether petitioner met income limits. Regarding the SNT, DCF did not provide authority that petitioner could revoke voluntary conservator's authority. The trust would appear to remain in effect since it was irrevocable. The SNT met all requirements of a valid trust. Appeal granted as to the denial based on excess assets and remanded on the issue of income.

Petitioner v. Florida Department of Children & Families, Appeal No. 06F-04827 (Dist. 8 Charlotte; Unit 88634 Oct. 20, 2006).

DCF approved petitioner for benefits through the Institutional Care Program (ICP) and established the patient responsibility. Petitioner appealed the amount of patient responsibility. Spouse argued she was entitled to income diversion.

Couple must prove the existence of exceptional circumstances resulting in significant inadequacy of the income allowance to meet their needs before the income allowance can be upwardly revised. Spouse was not entitled to excess shelter expense. Regarding spouse's monthly expenses, the ICP program sets the MMMIA to equal 150 percent of the federally defined poverty level. The intent of the ICP program is confined to address an individual's basic needs of food, shelter, medical costs and work-related expenses. Spouse is not entitled to cable, charges for cell phone, personal loan payments or the payment for life insurance. Spouse's monthly $450 food expense was not reasonable. Therefore, monthly expenses did not exceed income, and spouse was not eligible for diversion of her spouse's income using DCF's standard procedures or procedures of hearing officer. Appeal denied.

Petitioner v. Florida Department of Children & Families, Appeal No. 06F-04294 (Dist. 9 Palm Beach, Unit 88322 Oct. 23, 2006).

DCF denied petitioner for ICP Medicaid benefits because she did not meet the disability criteria. In June 2005, petitioner was diagnosed with psychosis, alcohol dependence, chronic obstructive pulmonary disease and hypertension. Petitioner left hospital and was admitted to a facility in June 2005. At time of application in May 2006, petitioner was under 65 years old. DMRT determined that petitioner was not disabled in June 2006 since impairment was not disabling for 12 full months.

Medical evidence showed conditions present in June 2005 were controlled with medication by April 2006. Petitioner is on psychotropic medications and found no evidence it interfered with her functioning, and she does not have marked restrictions on activities of daily living. Hearing officer cannot conclude that petitioner is unable to engage in any substantial gainful activity. Appeal denied.

Petitioner v. Florida Department of Children & Families, Appeal No. 06F-04817 (Dist. 4 Duval, Unit 88369 Oct. 30, 2006).

DCF denied Petitioner ICP benefits from December-May 2006 due to

continued, next page

Fair hearings reported

from preceding page

excess assets. DCF asked petitioner's representatives to verify cash value of life insurance policy and whether any payment from the policy would be to the nursing home or petitioner. DCF faxed a request to insurance company asking for policy information. DCF notified petitioner of cash value, which was over the asset limit. Petitioner surrendered policy in May 2006 and paid the facility with the proceeds the same month. Petitioner's representative argued that he did not know the value of the policy, and had DCF informed him of cash value earlier, eligibility would have been established sooner. DCF stipulated that petitioner would be eligible for May 2006, but petitioner was responsible for determining value of assets. DCF acted as a courtesy to inquire as to the asset's value.

There is no authority to allow ICP eligibility when family is unaware of the value of assets. Petitioner did reduce his assets to the asset limit for May 2006. Appeal granted in part.

Petitioner v. Florida Department of Children & Families, Appeal No. 06F-05126 (Dist. 4 Duval, Unit 88369 Nov. 3, 2006).

DCF denied petitioner ICP benefits from January-April 2006 due to excess assets. Petitioner requested that petitioner's claim reimbursement checks from insurance company go directly to the nursing home, and insurance company agreed. Petitioner's representatives did not know assets were over the limit. At the hearing, petitioner's representatives inquired about the burial exclusion since information regarding this policy was not provided at the eligibility interview.

Petitioner could designate up to $2,500 for burial even though funds in the bank account would be commingled with nonburial funds. Petitioner was not given this opportunity. Direct deposits can be subtracted from the bank account balances as well. Petitioner may be potentially eligible for these months since the lowest bank account balance amount in any month is to be used for the asset determination. Appeal granted and case remanded.

Petitioner v. Florida Department of Children & Families, Appeal No. 06F-05614 (Dist. 13 Citrus, Unit 88083 Nov. 15, 2006).

Petitioner appealed termination of ICP benefits because she did not follow through in establishing her eligibility. Petitioner reported to DCF she was going to sell her home but was not told that she had to report the sale of the home and provide documentation. DCF discovered in October 2005 that petitioner sold her home. DCF mailed a request for information (RFI) requesting verification of fair market value of petitioner's home in June 2006. The case number listed by DCF on the RFI was incorrect. In July 2006, DCF received a copy of the settlement statement for the sale of the home, checking account information and outstanding debts. DCF could not determine amount of spend-down from the net proceeds and mailed another RFI requesting documentation of the spend-down of the proceeds by August 7, 2006. The RFI listed the correct case number. Petitioner claims to have mailed the information, but DCF did not receive it and terminated ICP benefits on August 9, 2006.

There is a question as to whether information that was mailed to DCF was filed in the wrong case since DCF assigned two different case numbers to petitioner's case. DCF agreed to review all of the documents presented and determine eligibility during the period at issue. DCF must provide petitioner with an opportunity to provide the information necessary to determine her continued eligibility. Appeal granted.

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