

The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Inside:

- *The end of Medicaid retroactive eligibility?*
- *2018 changes to Florida's gun laws and their impact on incapacitated persons*
- *Earned through service: Veterans burial benefits*
- *The Elder Law Section at the Annual Florida Bar Convention*



The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar



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Statements or expressions of opinion or
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The Elder Law Advocate will be glad to run
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COVER ART

Sanibel Sunset
Randy Traynor Photography

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The deadline for the FALL 2018 EDITION: November 1, 2018. Articles on any
topic of interest to the practice of elder law should be submitted via email as an
attachment in MS Word format to Heather B. Samuels at hsamuels@solkoff.com
or to Genny Bernstein at gbernstein@jonesfoster.com, or call Leslie Reithmiller at
850/561-5625 for additional information.





Jason A. Waddell

Message from the Chair

Give more, get more

I find the leadership clicky —anonymous survey response

I am happy to start off my time as chair with some good news! The Elder Law Section has just appointed someone to the role of chair who is not a Florida native, who never attended a Florida school, who didn't have parents who were attorneys, and who didn't get hired by a large firm directly out of law school. Why is this good news? Because some seem to believe that to become involved in The Florida Bar, or more specifically within a Bar section, you must have a certain insider's track. There is little in my background to support such a belief.

As with any part of your life, you will get back from the Elder Law Section what you put into it. If all you do with the section is write a \$50 check for membership, you will receive an entire catalog of benefits (all, in my opinion, worth far more than \$50, but I am told not to go up on dues). You will receive our section's publication, the *Advocate*. If you read it cover to cover and act on the information inside, you should make your \$50 back many times over. You will also receive invitations for bimonthly CLE calls through our Mentorship Committee (where I started my volunteer work with the section). Attending those calls will provide you six hours of CLE credit, for the same \$50. You will receive discounts on other Elder Law Section CLEs like the two courses taught over three days each year in

Orlando at the Annual Update and Hot Topics (this year to be held on January 17, 18, & 19). Simply by writing a check for \$50, you will receive those benefits and more, all of which stand to make you a better attorney. What a deal!

If you say, "Well, Jason, I want more from my membership," then I am happy to give you the inside scoop on how you can get more—and don't worry, I am not going to hit you up for more money.

The way to get more is to give more, and by that I mean giving time through committee involvement. If you sign up for a committee, you will be included in conference calls that will allow you to learn about changes coming in the law and rules affecting your practice before others even know they are being discussed. You will be invited to attend calls with other committees where you can network and help solve problems that affect your clients. When you are at conferences, people will go out of their way to include you in their plans (often even when it is only their family going out).

I must caution you that joining a committee comes with some obligations on your part. You can't just sign up and be a fly on the wall. The Elder Law Section committees are working committees, not resume builders. Still, if you want more for your membership, there is no easier way. Aside from one live meeting in January, 99%

of committee meetings are by phone, so location isn't a barrier, cost isn't a barrier, and experience certainly shouldn't be a barrier. (We will help with that.)

As our amazing immediate past chair Collett Small pointed out in her last article, getting actively involved is how you get more from your membership. In fact, I challenge those who doubt I am speaking the truth to go read prior articles by section chairs in the *Advocate* as well as other section publications. You will note one common theme from these prior leaders; when they became engaged in working within the Elder Law Section, the section became engaged with helping them.

When I started my practice, I needed help. I was in a new state and felt as though I was tripping my way through developing a practice. I would talk with anyone who was willing to help. Luckily I found many attorneys willing to share their knowledge. (This was especially true of elder law attorneys I met at conferences.) One great piece of advice came from a staff person with LOMAS at the Bar who told me to volunteer. He suggested I start with our local Bar office, which, luckily for me, was run by Mike Doubek. Mike not only took me up on my offer to volunteer, but helped me learn of other ways to get

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Chair's message...
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involved. From there, one committee led to another and then another. Now I am chair of the section for the area of law I wanted to be in, helping clients who I wanted to help. Zig Ziglar said, "You can get everything in life

you want if you will just help enough other people get what they want." Being chair of the Elder Law Section is not the end goal of my journey, but it is a milestone of responsibility I appreciate and look forward to working within.

If your goal is to become a better elder law attorney, I implore you to get engaged. Join a committee, volunteer

for something you aren't sure you can do but want to try, ask what is needed, and go do that. As my Papa told me in college, find something no one wants to do and do it better than anyone expects it can be done, and you will succeed. I can't say it any better than that.

There is much work yet to be done. I look forward to working with you.



Committees keep you current on practice issues

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

ADMINISTRATIVE DIVISION

BUDGET

Chair

Victoria Heuler

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Bylaws: The budget committee shall be composed of the section's treasurer, the chair, and the chair-elect. The committee shall prepare proposed budgets and any amendments for submission to vote of the executive council.

The proposed budget arrives in the fall, is voted on by the Executive Committee, and is then forwarded to the Executive Council for discussion and vote. Finally, it is forwarded to the Bar for approval. The Budget Committee is to be included in discussions of any expenditure not in the budget. The chair of the committee shall bring any budget amendments to the attention of the Executive Committee for a vote.

CONTINUING LEGAL EDUCATION

Co-Chairs

Danielle Faller

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Marjorie Wolasky

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Bylaws: The CLE committee shall be responsible for arranging legal seminars and similar programs for the education of attorneys in the field of elder law.

No CLE may be scheduled without first contacting the co-chairs of the CLE Committee. The CLE Committee shall ensure that other committee co-chairs understand budgets and timelines.

MEMBERSHIP

Co-Chairs

Donna R. McMillan

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Bylaws: The membership committee shall be responsible for making recommendations to the executive council on affiliate membership, the membership directory, and any other functions assigned by the chair of the section.

The Membership Committee is tasked with contacting new members to make sure they are aware of opportunities to become involved with the section. The committee is to help the Executive Committee track any major changes in membership and to develop strategies for increasing membership.

MENTORING

Co-Chairs

Stephanie M. Villavicencio

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Bylaws: The mentoring committee shall be responsible for arranging programming geared to the education and professional development of members new to the field of elder law as well as matching these new attorneys with more experienced attorneys when requested.

The programming traditionally consists of bimonthly calls called Tricks of the Trade, which provides free CLE credit for members of the section. The Mentoring Committee may also communicate to the CLE Committee other areas for which people are requesting more information to help the CLE Committee determine CLE topics.

PUBLICATIONS

Co-Chairs

Heather B. Samuels

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Bylaws: The publications committee shall be responsible for furnishing articles for publication in Florida Bar publications, for publishing and distribution of a section newsletter, and for

publishing and distribution of written materials to the public, including the section's website.

The Elder Law Advocate is published quarterly by the section. The co-chairs are tasked with making sure substantive committees submit articles and reports. They may also seek out articles from other attorneys to be published. They work with the Bar on editing and proofing the publication.

SUBSTANTIVE DIVISION

ABUSE, NEGLECT, & EXPLOITATION

Co-Chairs

David A. Weintraub

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Ellen L. Cheek

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Bylaws: The exploitation and abuse committee shall identify sources of crime and abuse against elder citizens, identify the appropriate respondent with respect to such sources and what the response should be, determine whether appropriate actions are being taken and assess what legislative, agency, or other means may be necessary to enhance the assistance available to elderly victims of crime and abuse. The committee shall also review, study, and recommend legislative, agency, and other action to address the legal issues relating to age discrimination.

ESTATE PLANNING & ADVANCE DIRECTIVES, PROBATE

Co-Chairs

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Bylaws: The estate planning and advance directives committee shall review, evaluate, assist, and provide planning strategies to the elderly and practitioners regarding estate planning alternatives. In addition, the committee shall study and make proposals regarding health care advance directives.

ETHICS

Chair

Steven E. Hitchcock
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Bylaws: The ethics committee shall review, study, and recommend legislative, agency, and other action to address ethical issues that arise in the legal and other professions, including proposing codes of ethics in dealing with elderly persons for various professions.

The Ethics Committee is inactive until such time there is a complaint requiring its attention. This was decided by vote of the Executive Council in June 2014.

GUARDIANSHIP

Co-Chairs

Debra Slater

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Committees ...

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Bylaws: The guardianship committee shall review, study, and recommend legislative, agency, and other action to address the problems arising under the Florida guardianship statute and how better to implement the Florida Legislature's goals as stated therein.

LEGISLATIVE

Co-Chairs

William A. Johnson

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Bylaws: The legislative committee shall from time to time study and make recommendations to the executive council regarding requests for the section to adopt a legislative position, study and make recommendations to the executive council about legislative positions made by other sections, individuals, or entities, and disseminate news and opinions of proposed or enacted legislation on elder law matters among the various committees of the section.

MEDICAID/GOVERNMENT BENEFITS

Co-Chairs

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Bylaws: The Medicaid and government benefits committee shall study and make proposals regarding the availability of and eligibility for Medicaid and other government benefits.

SPECIAL NEEDS TRUST

Co-Chairs

Travis D. Finchum

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Bylaws: The special needs trust committee shall study, review, evaluate, assist, and provide planning strategies for the use of special needs trusts to assist the elderly and persons with disabilities. They shall also review, study, and recommend legislative, agency, and other action to address issues that arise in the drafting and administration of special needs trusts.

Recently the SNT Committee has also assisted with discussions about ABLE accounts.

VETERANS BENEFITS

Co-Chairs

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Bylaws: The veterans benefits committee will inform section members of benefits and care available to veterans. The committee will provide educational programs to section members regarding benefits and eligibility rules.

SPECIAL COMMITTEES

Bylaws: The chair of the section may appoint any special committee deemed necessary, with the concurrence of the executive committee. Chairs of such special committees shall also be members of the executive council. The special committee shall exist only for the term of the chair who appointed the special committee; however, the special committee may be reappointed during the following term or terms.

LITIGATION

Chair

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This is a new committee for 2018-19.

DISABILITY LAW

Co-Chairs

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This is a new committee for 2018-19.

CERTIFICATION

(Appointed through The Florida Bar)

Co-Chairs

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LAW SCHOOL LIAISON

Co-Chairs

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The Law School Liaison Committee helps promote the section's mission in law schools by helping law students and faculty understand the work elder law attorneys do, promoting events the section is hosting, and working with professors on ways to incorporate the field of elder law into their curricula.

SPONSORSHIP

Chair

Jill R. Ginsberg

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The Sponsorship Committee is tasked with finding sponsors and vendors for the Annual Update as well as limited sponsorships for the section. The committee may help sell ads in *The Elder Law Advocate* as a part of this sponsorship package; however, such ads must be coordinated with the Publications Committee. No company or organization shall be sold a sponsorship without the approval of the Executive Committee. The Sponsorship Committee shall maintain standards that further the section in accomplishing its mission statement. Sponsorships in exchange for substantive speaking roles at the Annual Update are to be avoided.

UNLICENSED PRACTICE OF LAW

Co-Chairs

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The UPL Committee is the section's watchdog for non-attorneys seeking to take advantage of Florida seniors by practicing law without a license. This committee assists the Legislative Committee and the Task Force in preventing UPL violations and seeking punishment for individuals and companies attempting to practice law without a license.

TECHNOLOGY

Co-Chairs

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The Technology Committee was previously the section's website committee. This committee is tasked with managing the section's website, Twitter, Facebook, and other social media as they may come online. This committee will assist other committees with posting updates, alerts, articles, etc.

STRATEGIC PLANNING

Co-Chairs

David Hook

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The Strategic Planning Committee follows up with committee members who are tasked with reaching certain goals. It also assists with selecting meeting dates and locations, as well as identifying members to serve on the committee. De facto members of the committee are the members of the Executive Committee. Other members are appointed by the section's chair and chair-elect in December.

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

Capitol Update

by
Brian Jogerst



Looking back at 2018 and looking ahead to 2019

With the 2018 Legislative Session firmly behind us—and the governor completing his review on all bills adopted by the Legislature—a quick look back is in order.

Elder exploitation/asset protection – signed by Governor Scott

This legislation was the priority issue developed by AFELA and ELS. Senator Kathleen Passidomo (R-Naples) filed Senate Bill 1536 and Representative Colleen Burton (R-Lakeland) filed House Bill 1059 designed to create a 15-day injunction to prevent assets from being shifted from a vulnerable adult and without the need to first hire an attorney. The legislation was based largely on the domestic violence injunction, permitting the vulnerable adult to file the petition with the clerk of the court for the 15-day injunction. AFELA and ELS worked with the RPPTL Section, the Florida Bankers Association,

as well as the clerks of the court to resolve concerns and to address questions they raised, including a provision ensuring that certain expenses can still be paid once the injunction is filed and ensuring that the financial institutions are properly noticed for the asset freeze. Throughout session, we met with legislators and testified before committees explaining the importance of the legislation and also provided real-life examples of people who would benefit from the provisions in the bill. On March 7, the Senate unanimously adopted the bill, and on March 8, the House unanimously adopted the bill.

On March 23, Governor Scott signed the bill into law [Chapter 2018-100].

Legislator of the Year – Representative Colleen Burton

At the recent AFELA UnProgram in Clearwater, we recognized Representative Colleen Burton (R-Lakeland)

as Legislator of the Year. We are truly grateful for her tireless dedication and support throughout the session to shepherd the elder exploitation/asset protection bill through the House.

Senator Passidomo, our previous Legislator of the Year, and Representative Burton are strong advocates for protecting Florida's vulnerable adults.

Elder exploitation training

To help train and to assist local organizations and other elder law attorneys so that our vulnerable adults can benefit from the new elder exploitation/asset protection law, AFELA and ELS will be conducting training seminars throughout Florida.

For more details on the seminars, please contact:

Shannon Miller
shannon@millerelderlaw.com

Nancy Wright
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Legislative overview

This past session saw the least number of bills filed and adopted by the Legislature. Specifically, note the following:

- 3,250 bills filed
- 2,271 amendments filed
- 2,853 bills on committee agenda
- 200 bills passed by both the House and Senate

As noted in previous legislative updates, the Legislative Committee reviewed more than 55 bills this past session, and drafted comments

During the AFELA Mid Year UnProgram & Legislative Update held May 11 in Tampa, Jill Brzezinski, president of the Academy of Florida Elder Law Attorneys, and Collett P. Small, chair of the Elder Law Section, presented the Legislator of the Year award to State Representative Colleen Burton. Rep. Burton sponsored the elder exploitation/asset protection bill, which was signed into law by Governor Scott. Florida Statute § 825.1035 took effect on July 1. Pictured here are State Representative Colleen Burton, Collett P. Small, and Jill Brzezinski.



or amendments to many of them. Providing this firsthand review is beneficial to legislators and further positions elder law attorneys as a trusted resource.

Bills adopted by the Legislature

The following is an overview of several bills the Legislature adopted this past session:

Guardianship/clerks of the court [Chapter 2018-68] – permits court clerks to conduct additional guardianship audits. One provision of concern was *ex parte* communications between the clerk and the judge, which was removed from the bill prior to its adoption by the Legislature.

Gun safety [Chapter 2018-003] – after the tragedy in Parkland, Florida, the governor, along with the House and Senate, called for changes to gun possession and ownership. Senate Bill 7026 was adopted by the Legislature and signed into law by Governor Scott (but has already been challenged in federal court). The bill included a provision prohibiting anyone who has been adjudicated mentally defective—as defined in Chapter 730.065(2)—from owning, possessing, or purchasing a firearm, which includes someone declared incapacitated under Chapter 744.331 (6)(a).

Reducing Medicaid eligibility retroactively from 90 days to the first day of the month in which the non-pregnant adult applies for Medicaid.

Appointment of attorneys for dependent children with special needs [Chapter 2018-14] – requires the payment of due process costs of litigation of all *pro bono* attorneys appointed to represent dependent children with certain special needs.

Public records/public guardians [Chapter 2018-16] – provides a public records exemption for certain identifying and location information of current or former public guardians.

Trusts [Chapter 2018-35] – deletes requirements that trusts be for the

benefit of the trusts' beneficiaries and revises a provision relating to notice or sending of trust documents.

Exemption for disabled service member or surviving spouse [Chapter 2018-118] – removes the requirement that a surviving spouse must have been married to the deceased veteran for at least five years to receive the \$5,000 homestead exemption.

Homestead waiver [Chapter 2018-22] – provides language that may be used to waive spousal homestead rights concerning devise restrictions.

Looking ahead – 2019 bills of interest

Remote notarization/electronic wills – ELS and AFELA actively opposed the electronic wills provision when it was raised during the final days of the 2018 Legislature Session. Fortunately, the legislation did not pass this year; however, the bills will return next session. ELS and AFELA are actively crafting their strategy and discussion points to ensure that any bill has sufficient protections for seniors and vulnerable adults.

Vulnerable investors – the legislation from 2018 was designed to permit security dealers to block the sale or transfer of funds/assets when the sale/transfer was suspicious. AFELA and ELS supported the bill after our concerns were addressed and resolved. After some regulatory issues were raised late in the session, the Legislature did not adopt the bill during the final days of session. We are working with the proponents of the bill in preparation for the 2019 Session.

Looking ahead – campaigns and elections

The 2018 Elections are fast approaching. Qualifying for office ended on June 22, and the following is a brief overview of the elections:

- Florida House of Representatives – 120 members
 - After the 2018 Election, the House may have approximately

40 new members, which equals almost one-third of the House

- Florida Senate – 40 members
 - After the 2018 Election, the Senate will have at least five new members
- Governor and Cabinet
 - Governor Rick Scott – running for U.S. Senate
 - Attorney General Pam Bondi – term limited
 - Chief Financial Officer Jimmy Patronis – was appointed to the office due to the resignation of Jeff Atwater; Patronis is running for the office
 - Agriculture Commissioner Adam Putnam – term limited; Putnam is running for governor

AFELA and ELS are actively reviewing candidates running for office and—just like in 2016—will be supporting selected candidates.

Legislative Committee

As always, from the review of legislation filed during session to the grassroots relationships with legislators, the involvement of elder law attorneys is critical to our legislative successes.

If you have any desire to be involved, please contact the co-chairs of the ELS Legislative Committee:

Bill Johnson

wjohnson@floridaelderlaw.net

Shannon Miller

shannon@millderelderlaw.com

As previously discussed, we have enjoyed success on legislative issues by working with legislators and providing feedback to them, as well as by testifying at committee hearings. We look forward to continuing this work on behalf of elder law attorneys.

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

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The end of Medicaid retroactive eligibility?

by Heidi M. Brown

You may have heard rumors about the end of Medicaid retroactive eligibility and coverage. Currently, according to the Medicaid Act, a Medicaid applicant can request and receive up to three months of retroactive eligibility from the date of the application.¹ For instance, if an applicant applies in April, he or she can request and receive Medicaid coverage for the months of January, February, and March, if the applicant would have met all the eligibility requirements during those previous months. Many applicants, Medicaid providers, and elder law attorneys rely on the protection afforded by retroactive eligibility because there can be barriers to applying for Medicaid. This protection might be eliminated.

By way of background, the 2018-19 Florida budget requested the Florida Agency for Health Care Administration (AHCA) to seek federal approval to “eliminat[e] the Medicaid retroactive eligibility period for non-pregnant adults.”² The Medicaid applicant would then be eligible the first day of the month of application.

In March 2018, AHCA prepared an amendment request to amend Florida’s 1115 MMA waiver to eliminate the three-month retroactive eligibility for applicants.³ According to the Florida budget and the waiver amendment application, the initial effective date would have been July 1, 2018, if approved by the U.S. Centers for Medicare and Medicaid Services (CMS). Although the amendment is titled MMA, or managed medical assistance, it would affect applicants for institutional care placement (ICP) and the long-term care waiver. It could also affect applicants who are already on Medicaid who are more than three months late in submitting their Medicaid annual review.

Per federal requirements, AHCA held two public meetings and a 30-day public comment period. On April 27,

2018, AHCA submitted the amendment request to CMS for approval. The federal comment period was from May 4, 2018, through June 5, 2018. As of this writing, CMS has not yet decided whether to eliminate the three-month retroactive eligibility.

Assuming CMS does approve the elimination of the three-month retroactive eligibility, there could be disastrous effects on the elderly and disabled adults.

For example, when elderly people need Medicaid assistance, oftentimes they need the assistance to pay for a skilled nursing home. Unfortunately, it may take more than 30 days to gather information about the applicant’s assets, income, and previous gifting/transfers to verify Medicaid eligibility. Sometimes it may take more than 30 days solely for a financial institution to review a power of attorney document and to comply with a request for information. If the Medicaid applicant is incompetent or the power of attorney document is insufficient for Medicaid planning, it may be necessary for someone to petition the court for a guardianship over the Medicaid applicant, which may take up to several weeks.

Another example of how eliminating retroactive eligibility can be detrimental to vulnerable adults is the previously healthy, capable, and uninsured person who is in a catastrophic accident. During this crisis, the applicant may not be physically or mentally able to compile the necessary information for a Medicaid application. Also, the applicant’s family and caregivers may be more concerned with the applicant’s care, and ultimately survival, rather than how to pay the medical providers or a long-term care facility.

In the above cases, the applicant may lose out on at least one month of retroactive coverage. Consequently, skilled nursing homes, which

typically cost between \$7,000 and \$15,000 per month, may require the applicant to pay the private pay rate until Medicaid approves the application. Another negative consequence might be that applicants and medical providers could file the Medicaid application before verifying all of the income, assets, and gifting/transfer history to try to ensure coverage for the month of admission to the skilled nursing home or hospital.

We are in a wait-and-see mode regarding whether CMS will approve the waiver amendment. We are hopeful that CMS will not approve it. Either way, the Elder Law Section and the *Advocate* will keep you informed of the ultimate outcome and will provide tips for possibly counteracting any deleterious effects.



Heidi M. Brown, Esq., a board certified elder law attorney, is an associate with Osterhout & McKinney PA in Fort Myers, Fla. She is co-chair of the ELS Medic-

aid Committee. Her practice includes Medicaid planning, VA planning, estate planning, probate, and trust administration. She received her law degree from the College of William and Mary Law School in Williamsburg, Va., and her undergraduate degree from Georgetown University in Washington, D.C.

Endnotes

- ¹ See 42 U.S.C. 1396a(a)(34).
- ² H.B. 5001, 2018-9, Reg. Sess. (Fla. 2018).
- ³ See FL Agency for Health Care Administration, Managed Medical Assistance Waiver Amendment Request-Low Income Pool and Retroactivity Eligibility (June 12, 2018) available at http://www.fdhc.state.fl.us/medicaid/Policy_and_Quality/Policy/federal_authorities/federal_waivers/mma_amend_waiver_LIP_2018-03.shtml.

2018 changes to Florida's gun laws and their impact on incapacitated persons

by Elizabeth M. Hughes

On March 9, 2018, after the tragic events in Parkland, Florida, Governor Rick Scott signed into law Senate Bill 7026, known as the Marjory Stoneman Douglas Public Safety Act.¹ The Act makes important changes to Chapter 790, Florida Statutes, which governs weapons and firearms. The original intent of the Legislature was to make significant changes to Florida laws to keep firearms out of the hands of those suffering from mental illness.²

The Act makes several significant revisions to Florida's gun laws by banning bump-fire stocks, increasing the legal age to purchase firearms to 21 years of age (with some exceptions), and imposing a three-day waiting period for all gun sales, not just handguns, or until the background check is completed, whichever is later. Important to elder law practitioners, legislation was enacted that addresses firearms ownership and possession for individuals who have been adjudicated incapacitated or who are subject to proceedings under the Florida Baker Act. Notably, the new legislation explicitly prohibits a person who has been adjudicated mentally defective³ or who has been committed to a mental institution⁴ from *owning* or possessing a firearm until a court orders otherwise.

Section 790.401 - new risk protection order

The Marjory Stoneman Douglas Act includes new Florida Statute § 790.401, which creates a process for a law enforcement officer or a law enforcement agency to petition the court for a risk protection order that temporarily prevents individuals who are at high risk of harming themselves or others, including "significant danger as a result of a mental health crisis

or violent behavior," from accessing firearms.⁵

The mechanism known as a petition for risk protection order allows law enforcement to confiscate guns from people who are being involuntarily committed to treatment under the Baker Act or who pose a significant threat to the safety of themselves or others. Upon entry of a risk protection order, the order requires immediate surrender of all firearms and ammunition in the person's custody, control, or possession. As an alternative to surrender, a respondent has the option to request to transfer his or her firearms to a legally eligible person who agrees to keep them away from the respondent.⁶

The new legislation further allows a court to issue a temporary *ex parte* risk protection order in certain circumstances.⁷ When a risk protection order is entered, the issuing court is required to forward the orders to the Department of Agriculture, which is then required to suspend the individual's license to carry concealed weapons. The newly enacted statute also provides a mechanism to vacate or extend the risk protection order. The gun owner whose firearms were removed under the risk protection order can petition to get them back after 30 days.

Section 790.064 - firearm possession and ownership disability

The Marjory Stoneman Douglas Public Safety Act also creates new Florida Statute § 790.064, entitled Firearm Possession and Firearm Ownership Disability, which prohibits a person who has been adjudicated mentally defective or has been committed to a mental institution from owning or possessing a firearm until certain relief is obtained.⁸ This newly

enacted statute states that (1) [a] person who has been adjudicated mentally defective or who has been committed to a mental institution, as those terms are defined in s. 790.065(2), may not own a firearm or possess a firearm until relief from the firearm possession and firearm ownership disability is obtained. Subsection 2 of § 790.064 explains that the firearm possession and firearm ownership disability runs concurrently with the firearm purchase disability provided in s. 790.065(2).⁹

Changes to Florida Baker Act

Concurrent changes were made to Chapter 394, which is known as the Florida Mental Health Act or Baker Act. The changes to Florida Statute § 394.463 authorize a law enforcement officer who is taking a person into custody for an involuntary examination under the Baker Act to seize and hold firearms or ammunition from the person if the person poses a potential danger to him or herself or others and has made a credible threat of violence against another person.¹⁰

The new legislation makes clear that if a law enforcement officer, while taking someone into custody for involuntary examination under the Baker Act at the person's residence, may also seek the voluntary surrender of firearms or ammunition *kept in the residence* if such firearms or ammunition were not already voluntarily surrendered.¹¹

Conclusion

The Marjory Stoneman Douglas Public Safety Act fundamentally modifies the status quo and affords law enforcement officers far-reaching new tools to protect the public when they encounter someone suffering from mental health illnesses in possession of a firearm or those who

possess firearms and are a danger to themselves or others, regardless of their mental health capacity.

Although the constitutional right to keep and bear arms¹² is still not a delineated right that is either removed, delegated, or specifically retained by an individual during incapacity proceedings, the 2018 changes to Florida's gun and mental health laws appear to impose a real-world elimination of this right for those who have been adjudicated incapacitated. The changes to Chapter 790 are significant; Chapter 790 previously addressed only the possessing, purchasing, and transferring of firearms. The Act now adds language to Chapter 790 placing broad restrictions on *ownership* of firearms for these individuals, which is important for guardians, trustees, and other agents to consider when managing property.

Elizabeth M. Hughes, Esq., is an attorney in Greenspoon Marder's Wills, Trusts & Estates practice



group in Miami, Fla., where she represents clients in all aspects of probate, trust, and guardianship litigation. She is a proud graduate of Class Two (2017) of the ACTEC Florida Fellows Institute. She is vice chair of the Probate and Guardianship Committee of the Dade County Bar Association.

Endnotes

1 FLA. LEGIS., FINAL BILL ANALYSIS, 2018 REG. SESS., for SB 7026, *available at* <https://www.flsenate.gov/Session/Bill/2018/7026/Analyses/2018s07026.ap.PDF>.

2 *Id.*

3 Florida Statute Section 790.065 defines "adjudicated mentally defective" to mean: "a determination by a court that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease, is a danger to himself or herself or to others or lacks the mental capacity to contract or manage his or her own affairs. The phrase includes a judicial finding of incapacity under s. 744.331(6)(a), an acquittal by reason of insanity of a person charged with a criminal offense, and

a judicial finding that a criminal defendant is not competent to stand trial."

4 Florida Statute Section 790.065 defines *committed to a mental institution* to mean: "(I) Involuntary commitment, commitment for mental defectiveness or mental illness, and commitment for substance abuse. The phrase includes involuntary inpatient placement as defined in s. 394.467, involuntary outpatient placement as defined in s. 394.4655, involuntary assessment and stabilization under s. 397.6818, and involuntary substance abuse treatment under s. 397.6957, but does not include a person in a mental institution for observation or discharged from a mental institution based upon the initial review by the physician or a voluntary admission to a mental institution; or (II) Notwithstanding sub-sub-subparagraph (I), voluntary admission to a mental institution for outpatient or inpatient treatment of a person who had an involuntary examination under s. 394.463," where additional requirements and criteria are met.

5 Fla. Stat. § 790.401(2).

6 *Id.*

7 Fla. Stat. § 790.401(3).

8 Fla. Stat. § 790.064.

9 *Id.*

10 Fla. Stat. § 394.463(2).

11 *Id.*

12 U.S. CONST. amend II. The Second Amendment to the United States Constitution states, "a well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."



Call for papers – Florida Bar Journal

Jason A. Waddell is the contact person for publications for the Executive Council of the Elder Law Section. Please email Jason at jason@ourfamilyattorney.com for information on submitting elder law articles to The Florida Bar Journal for 2018-2019.

A summary of the requirements follows:

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

Review is usually completed in six weeks.



Wrongful death, special needs, and the elderly: A case study

by Joseph B. Landy

Recently, I settled a case involving a 92-year-old woman who was leaving her bridge game at a local church. As Claire walked through the parking lot, a vehicle backing out of a parking space struck her, threw her to the ground, and fractured her hip. She was taken to the hospital, underwent hip replacement surgery, but suffered for the next four months until she died.

She was survived by her three adult children, the youngest of whom, 65-year-old Matt, has special needs. Matt has battled mental illness the bulk of his life. The oldest son, Abe, is an attorney who initially attempted to handle the case himself, but fortunately he sought representation with a specialist before settling the case.

After accepting representation, I spent a significant amount of time with the family, especially with the survivor who has special needs. Due to his special needs, he has extremely limited social skills. As a result, the bulk of his activities were focused on his mother. They spent each day together eating, going to the movies, and driving to her appointments. The old saying that “you may be just one person to the entire world, but you may be the entire world to one person” certainly holds true for the love this man had for his mother. Moreover, due to his special needs, he was not able to understand and digest the violent nature of his mother’s death. The family was not able to prepare him for her unnatural demise. His childlike nature, coupled with his inability to process his grief, led to extraordinary mental anguish.

By fully exploring these damages, and advocating aggressively on behalf of the family, I was able to obtain a settlement in the amount of \$3.05 million on their behalf. Matt’s

entitlement to public benefits is protected by his supplemental needs trust, an avenue for which the readers of this publication hold significant expertise. The amount of the settlement—which far exceeds a typical jury verdict for the wrongful death of someone in their 90s—exemplifies the special damages sustained by this special family. The trust will allow Matt to have the care he needs to live his life with the support he requires, given his level of care needs.

Pursuant to the Florida Wrongful Death Act (Section 768.21, Florida Statutes), in the event of the loss of life due to the negligence of another, the damages include the mental anguish of the survivors. This makes every case unique, but those involving minor or adult children with special needs—either as the decedent or as a survivor—are particularly challenging. Unfortunately, insurance companies, insurance defense attorneys, and far too often plaintiff’s attorneys, believe that cases involving special needs children have a “diminished value.” If handled properly, however, the cases actually have an increased value.

Given the statistics of the special needs population in our country, the odds of any plaintiff’s attorney handling a case involving a special needs child is very high. For instance, a generation ago the rate of autism was one in 10,000. At the time of the most recent study by the Centers for Disease Control and Prevention, in 2012 the rate had risen to one in 69 children—affecting one in 42 boys and one in 189 girls. This means that autism affects more than 70 million people worldwide. Moreover, according to the National Organization on Disability, nearly one-fifth of all Americans have a physical, sensory, or intellectual disability. Considering these statistics,

it is critical that the personal injury practitioner is able to identify, evaluate, and advocate for special needs children and their families.

Although the money will never bring back his mother, it will allow Matt to be financially protected and to live comfortably for the remainder of his life. It also has allowed the family to assist him with moving and engaging in new activities as he starts his new life. This case demonstrates that in order for families of special needs children to have aggressive representation—and to be fully protected—it is critical for elder law attorneys to work together with personal injury attorneys to ensure the best possible outcomes in these multifaceted cases.



Joseph B. (Joe) Landy, Esq., is a partner with the personal injury firm of Lesser, Lesser, Landy & Smith PLLC. Joe is a board certified civil trial lawyer with over

25 years of experience handling personal injury, wrongful death, medical malpractice, and nursing home cases. He is listed in *Best Lawyers in America*, *Lawdragon 500 Leading Plaintiff’s Lawyers in America*, *National Trial Lawyers Top 100 Trial Lawyer*, *Florida Super Lawyers*, *Florida Legal Elite*, and *Florida’s Top Lawyers*, and was honored as a top ten lawyer by the Top 10 Nursing Home Trial Association. Joe was one of only 32 lawyers to be inducted into the *Daily Business Review’s Trial Lawyers Hall of Fame*. Joe serves on the boards of *Healthy Mothers*, *Healthy Babies* and *Oakstone Academy of the Palm Beaches*.

Elder Law Section installs new officers and celebrates members' achievements during the Annual Florida Bar Convention

The Elder Law Section held its annual executive council/membership meeting and awards presentation on June 15 in conjunction with the Annual Florida Bar Convention in Orlando. Chair Collett Small passed the gavel to Jason Waddell, who will lead the section for the 2018-19 year. Congratulations to Jason and our new Executive Committee:

Jason A. Waddell, Pensacola
Chair

Randy C. Bryan
Chair-Elect

Steven E. Hitchcock, Clearwater
Vice Chair, Administrative

Carolyn Landon, West Palm Beach
Vice Chair, Substantive

Victoria E. Heuler, Tallahassee
Treasurer

Howard S. Krooks, Boca Raton
Secretary

Collett P. Small, Pembroke Pines
Immediate Past Chair

ELS presents annual awards

Recognizing deserving members for their service to the elder law profession is a favorite tradition of the Elder Law Section.

This year the section presented its Lifetime Achievement Award to Babette Bach, section chair 2009-10, for her illustrious career in elder law and her fierce passion for advocacy. To present the award, 2017-18 ELS Chair Collett Small was joined past ELS Chair Emma Hemness, who provided a personal introduction and touching tribute to Babette. In her acceptance speech, Babette spoke about the importance of having a progressive management style that inspires loyalty from staff and clients. Babette's family and law firm staff demonstrated this loyalty with their attendance of the award ceremony in Orlando.

Babette Bach is a Florida Bar board certified elder lawyer and a certified elder law expert by the National Elder Law Foundation. She was the chair of the Elder Law Section from 2009 to 2010 and chair of the Sarasota County Bar Association's Estate Planning and Probate Section from 2016 to 2017. She is the founder of Bach, Jacobs, & Byrne PA in Sarasota.

Bill Johnson received the Elder Law Section Member of the Year Award for his service and dedication to elder law. Bill continues to provide exemplary

service to the section as co-chair of the ELS Legislative Committee.

Ellen Morris received the prestigious Charlotte Brayer Public Service Award for her service and dedication to elder law. Ellen was the ELS chair from 2017 to 2018. She is chair of the section's Litigation Committee, and she continues to contribute her expertise to benefit ELS members and the clients they serve.

We congratulate these members and are grateful for their commitment to the Elder Law Section.

The section would also like to recognize John Clardy, Emma Hemness, and Heidi Brown for presenting on public benefits during the Annual Florida Bar Convention. The seminar was a joint presentation by The Florida Bar CLE Committee and the Elder Law Section.

The Elder Law Section was proud to be a sponsor of the Judicial Luncheon Honoring Florida's Judiciary on June 14. ELS Chair Collett P. Small, Chair-Elect Jason A. Waddell, Budget Chair Carolyn Landon, and CLE Chair Sam Boone, Jr., represented the section at this event.



ADVERTISE

in *The Elder Law Advocate!*

The Elder Law Section publishes three issues of *The Elder Law Advocate* per year. The deadlines are March 1, July 1 and November 1. Artwork may be mailed in a print-ready format or sent via email attachment in a .jpg or .tif format for an 8-½ x 11 page.

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ELDER LAW SECTION AT THE ANNUAL FLORIDA BAR CONVENTION JUNE 13-16, 2018 • ORLANDO, FLORIDA



Members of the Executive Council are fully engrossed in Jason Waddell's illustration of the importance of team work and good communication within the section.



Jason Waddell conducts his first of many executive council meetings as the new chair of the ELS. Welcome, Jason.



Collett Small presents the ELS Member of the Year Award to Bill Johnson.



Collett Small presents the prestigious Charlotte Brayer Public Service Award to Ellen Morris.



Collett Small (right) presents the ELS Lifetime Achievement Award to Babette Bach.



Babette Bach shares her philosophy of leadership.



The passing of the gavel ... Collett Small, a dedicated, committed, and motivational chair hands off the gavel to our new section chair, Jason Waddell. We thank Collett for her wonderful service to our section and welcome Jason as our new chair.



Jason Waddell presents a gift of appreciation to Collett Small in recognition of her service as chair.



Friends and colleagues congratulate Babette Bach on her ELS Lifetime Achievement Award. Pictured are David Hook, Babette Bach, Emma Hemness, John Clardy, Collett Small, Twyla Sketchley, and Ellen Morris.



John Clardy, Emma Hemness, and Heidi Brown serve on a panel during the joint Florida Bar CLE Committee/ELS Public Benefits Seminar on June 15.



Sam Boone, Collett Small, Carolyn Landon, and Jason Waddell enjoy the Judicial Luncheon Honoring Florida's Judiciary on June 14.

Earned through service: Veterans burial benefits

by Javier A. Centonzo

As elder law attorneys in Florida, we have the great fortune of meeting and representing many veterans and their families. In my experience, among the many benefits available to veterans and their dependents, burial benefits are one of the least known. This is truly unfortunate because these burial benefits can save the veteran or the veteran's family a good amount of money and help ensure that a veteran's service is recognized and honored.

Burial benefits are administered by the National Cemetery Administration of the U.S. Department of Veterans Affairs (VA). For VA purposes, "burial" means all the legal methods of disposing of the remains of a deceased person, including, but not limited to, cremation, burial at sea, and medical school donation.¹

Burial benefits for the veteran include, at no cost to the family: a gravesite in a VA national cemetery with available space; opening and closing of the grave; perpetual care of the gravesite; a government headstone or marker; a burial flag; and a presidential memorial certificate. Even if a veteran is cremated, the cremains can be buried or inurned in a national cemetery with the same honors as casketed remains. For those veterans who want to be buried in a VA national cemetery, there is the pre-need burial eligibility determination program where, as the name suggests, they can submit an application to determine eligibility for burial in a VA national cemetery.² I always encourage my veteran clients, as part of their estate planning, to submit an application to this program in order to make things easier on their family when they pass away.

Many veterans choose not to be buried in a VA cemetery and, as a result, believe they aren't eligible for

VA burial benefits. A veteran can, however, get a government-furnished burial or memorial headstone or marker to be placed in a private cemetery.³ The government-furnished headstones are upright and made of either marble or granite, and the markers can be bronze, granite, or marble. There is also an option for a bronze niche for placement on a mausoleum crypt. Alternatively, a veteran buried in a private cemetery can obtain a government-furnished medallion to be affixed to an existing headstone or marker.⁴ The medallions are bronze and come in three different sizes.

Never assume that a private funeral director or cemetery administrator will know about this benefit. Several times I have had to inform funeral and cemetery directors about this benefit on behalf of my clients or loved ones in order to get a refund for headstones or markers they purchased unnecessarily. It is also important to note that the cost of placing/setting the headstone, marker, or medallion in a private cemetery is *not* covered by the VA.

Burial allowances for the veteran include: burial allowance based on service-connected death; burial allowance based on non-service connected death; burial allowance for a veteran who died while hospitalized by the VA; burial plot or interment allowance; and reimbursement for transportation of remains.⁵ For a veteran with a service-related death on or after Sept. 11, 2001, the VA will pay up to \$2,000 toward burial expenses, and will cover some or all of the cost of transporting the remains if the deceased is buried in a VA national cemetery. For non-service related deaths on or after Oct. 1, 2017, the VA will pay a \$762 plot-interment allowance if the veteran is not buried in a VA

national cemetery. The VA will also pay up to \$762 for funeral and burial expenses if the veteran died while hospitalized in a VA hospital, or \$300 if the veteran was not hospitalized in a VA hospital at the time of death.

To be eligible for a burial allowance, the claimant must have paid for the veteran's burial or funeral and have not already been reimbursed by another government agency or some other source. Additionally, the veteran must have been discharged under conditions other than dishonorable, and must have: 1) died because of a service-related disability; 2) been receiving VA compensation or pension at the time of death; 3) been entitled to receive VA compensation or pension but chose not to reduce his or her military retirement or disability pay; 4) died while hospitalized by the VA or while receiving VA contract care at a non-VA facility; 5) died while traveling under the VA's authorization and at the VA's expense for the purpose of examination, care, or treatment; 6) died while an original or reopened claim for VA compensation of pension was pending and was found to be eligible for the claimed benefit from a date prior to the date of death; or 7) died on or after Oct. 9, 1996, while a patient in a VA-approved state nursing home.

Before applying for a burial allowance, the claimant should have the veteran's death certificate,⁶ and either a receipt showing the claimant made partial or complete payment or a statement of account from the funeral director or cemetery owner showing the name of the veteran for whom the services were provided, the cost and type of services provided, any credits given, and any remaining unpaid balance. The claimant may file a claim online at vets.gov; complete VA Form 21P-530, Application for

Burial Allowance,⁷ and take it to the local VA regional benefit office; mail a completed claim form to the Pension Management Center; or preferably have a veterans service officer help to complete the form and file the claim.

Spouses and dependents of eligible veterans may also be buried in a VA national cemetery.⁸ A spouse or surviving spouse of a veteran may be eligible for interment in a national cemetery even if that veteran is not buried in a national cemetery. A veteran's surviving spouse who subsequently remarried and whose death occurred on or after Jan. 1, 2000, is eligible for burial in a national cemetery. The minor child and in some cases an unmarried adult child of an eligible veteran can be buried in a national cemetery. For VA purposes, a minor child is a child who is unmarried and is under 21 years of age, or is under 23 years of age and pursuing full-time instruction at an approved educational institution. For VA purposes, an eligible unmarried adult child can be of any age but became permanently physically or mentally

disabled and incapable of self-support before reaching the age of 21, or before reaching 23 years of age if pursuing a full-time course of instruction at an approved educational institution. The VA will not provide a headstone or a marker for an eligible spouse or dependent unless this person is buried in a VA national cemetery, a state veteran's cemetery, or a military base/post cemetery.

We are fortunate to practice law in a state that so many veterans call home. As elder law attorneys, we are valuable sources of information to our clients and communities, and as such, it is important that we are aware of the benefits available to our clients who have served our country.



Javier A. Centonzio, Esq., is a partner and co-founder of Weylie Centonzio PLLC. He received the JD and the LLM in elder law from

Stetson University College of Law. He is co-chair of the ELS Veterans Benefits Committee and a veteran who served in the United States Marine Corps and the Kansas Army National Guard. His areas of practice include elder law, estate planning, personal injury, and veterans disability appeals.

Endnotes

1 38 C.F.R. § 3.1700(b) (2018).

2 VA Form 40-10007, Application for Pre-Need Determination of Eligibility for Burial in a VA National Cemetery, available at <https://www.va.gov/vaforms/va/pdf/VA40-10007.pdf>.

3 VA Form 40-1330, Claim for Standard Government Headstone or Marker, available at <https://www.va.gov/vaforms/va/pdf/VA40-1330.pdf>.

4 VA Form 40-1330M, Claim for Government Medallion for Placement in a Private Cemetery, available at <https://www.va.gov/vaforms/va/pdf/VA40-1330M.pdf>.

5 38 C.F.R. § 3.1700(a) (2018).

6 A list of alternate approved types of evidence of a veteran's death can be found at 38 C.F.R. § 3.211 (2018).

7 VA Form 21P-530, Application for Burial Allowance, available at <https://www.vba.va.gov/pubs/forms/VBA-21P-530-ARE.pdf>.

8 38 C.F.R. § 38.620(e).

NEED TO UPDATE YOUR ADDRESS?

The Florida Bar's website (www.FLORIDABAR.org) offers members the ability to update their address and/or other member information.

The online form can be found on the website under "Member Profile."



Mark your calendar!

September 21, 2018

18th Annual Elder Concert

Florida Atlantic University
Boca Raton, Florida

October 4-6, 2018

Elder Law Section Retreat

Washington Marriott at Metro Center
Washington, D.C.

January 17-19, 2019

**Elder Law Section Annual Update
Conference**

January 17: Essentials of Elder Law
January 18-19: Elder Law Annual
Update & Hot Topics

June 26-29, 2019

Annual Florida Bar Convention

Boca Raton Resort & Club

June 28, 2019

**Elder Law Section Midyear
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Boca Raton Resort & Club

Visit the Elder Law Section on Facebook



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

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

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

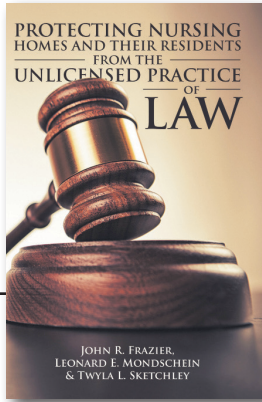
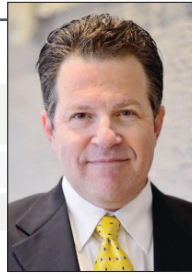
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THE FLORIDA BAR
ELDER LAW SECTION

Book Review

by
Scott M. Solkoff



Protecting Nursing Homes and Their Residents From the Unlicensed Practice of Law

by John R. Frazier, Leonard E. Mondschein, and Twyla Sketchley, Lulu Publishers (2018)

The problem

Janet and Bob Ross did everything they knew to be right. They went to an attorney who did their revocable trust, pour-over wills, powers of attorney, and health care advance directives. They properly funded their trust. They paid for long-term care insurance, the premiums for which they could ill afford. They saved a nest egg of approximately \$300,000. Then everything fell apart.

Bob fell and entered rehab after a hospital stay. Due to complications, when Medicare rehab coverage ended, the decision was made for Bob to stay in skilled nursing for some time, maybe for good. A social worker at the nursing home told Janet about “XYZ Medicaid Services,” a “wonderful organization that will make sure your assets are protected and that you don’t have to pay our normal rate of \$11,000 per month.” The social worker assured Janet that many of the nursing home’s residents had successfully achieved Medicaid eligibility by using their service. “And the best part is,” the social worker said, “their \$5,000 fee pays for itself in just two weeks of our bill.”

The rest of the story is not so good. Suffice it to say that poor advice has consequences. Without knowing the intricacies of the law, even with an “affiliated attorney,” XYZ messed up. Janet and Bob’s assets were unnecessarily locked down, certain benefits lost, and a large portion of the assets unnecessarily wasted. Janet and the family were upset. They sued the nursing home, among others.

The solution

The Florida Supreme Court has determined that Medicaid planning can be the unlicensed practice of law (UPL) when done by a non-lawyer. While it is helpful evidence of the harms of UPL, the Supreme Court’s opinion is a legal document, written by lawyers and judges for lawyers. One of the main solutions to the harms caused by UPL is educating the public and those who are complicit in leading the public astray.

Frazier, Mondschein, and Sketchley do just that with their forthcoming book. It explains why nursing homes and others can be liable for referring residents to non-attorney Medicaid planners. In short, the public can be harmed, and the facilities and their employees may be liable for that harm. With this publication, elder law attorneys will have something

that can be distributed to nursing homes to drive home the dangers of referring legal work to non-attorneys. Often from the best of motives (and maybe sometimes not), employees of nursing homes are referring unknowing consumers to practitioners of UPL. By distributing this book, it will be difficult for referrers to claim ignorance when a negligent referral leads to harm.

The book is well organized. Each of the book’s 16 chapters is organized with subheadings. The authors adeptly avoid the use of legalese. It should be digestible to social workers, facility administrators, consumers, and yes, even elder law attorneys. The book’s premise may seem self-serving—“call an elder law attorney”—but for the fact that it makes a solid case as to the dangers of doing otherwise. I personally plan on distributing this book to nursing home owners and administrators in person. Consider doing the same. Consider this book a tool in your arsenal for fighting on behalf of our seniors.

Scott M. Solkoff, Esq., of Solkoff Legal PA in Delray Beach, Fla., is a board certified elder law attorney. His law firm exclusively represents the elderly, people with disabilities, and their caregivers.

Tips for handling clients who fail to pay their bills

by Audrey J. Ehrhardt

Do you wear the hat of bookkeeper for your law practice? Does that role expand beyond mere bookkeeping into accounting, reminders, and general operations? In all too many solo practitioner and small firms, this is the job many attorneys need to do to keep the firm moving forward.

Unfortunately, there may come a time in your practice when a client fails to pay his or her bill. Despite the best plans and policies, this can happen. This client's actions could be for any number of reasons, but regardless of why, it is no less frustrating when you are faced with this challenge, especially when the work is already complete.

How you handle this issue may at first seem simple, but billing issues can have a significant impact on your practice when they are left unaddressed. How you address nonpayment needs to be handled in a manner that represents your business well.

Many of us can be reactionary under stress, but it is important not to let your emotions get the better of you when you are managing your finances. A conversation about past-due payments can be fraught with stress on both sides. Misunderstandings can lead to frustration, with the client becoming upset and even angry. When it comes to your law firm's reputation in the community, you need to balance the fulfillment of the bill and your practice brand. It is unfortunate, but we see a trend of clients who did not have a satisfactory experience with a law firm, including over billing, leaving ambivalent or negative reviews for the firm.

How do you find a balance between being compensated for the excellent work you do and a client's failure to pay your bill? Let me share seven best practice tips for successfully managing this issue.

- 1. Always have a contract.** Always have a contract! No, my repetition is not a typo. When you have a contract for your services, you can further insulate yourself from your client misunderstanding your fees, scope of representation, and billing timeline.
- 2. Use your trust account.** When appropriate, collect the money for the case up front and place it in your trust account. Bill according to when work is completed with proper notice to the client. This step can eliminate the need to wait for checks and the potential for miscommunication.
- 3. Never respond emotionally.** Emotions can run high on both sides when money is involved. Do not let yours get the best of you. A missed or late payment from a client is frustrating, but it is not the end of your practice. Be calm, logical, and clear when talking to your client about a bill that he or she needs to pay.
- 4. Control the conversation through client management letters.** Often, billing lapses could be avoided with frequent, consistent communication with your clients. Let them know the who, what, where, when, and why of your billing practices. Stay consistent, bill every month, and give your client a letter, in addition to the retainer agreement, that explains what to expect in your relationship.
- 5. Explain the entire scope of charges.** How thorough is your retainer agreement? If you need to charge for fees and costs associated with filing, is it detailed in your contract? If you have increased the hourly cost of your paralegal, is it in your contract? Be sure to look at your contract at least quarterly, revising it when necessary, to ensure the costs of a case are thoroughly represented.
- 6. Evaluate if it is time to hire a new team member.** Billing, especially complicated law practice billing, can be a full-time job. This may not be a job you have time to complete each week because you are busy practicing law. Consider if it is time to hire an employee or a contractor who could take over billing activities from you and ensure they are handled consistently each month.
- 7. Know when you need to pursue legal action to recover your fees.** You are entitled to be paid. It is not fair, right, or equitable for a client to hire you and then fail to pay your fees. You do not have to accept nonpayment as an outcome. If, after a demand letter, he or she still has not paid the fee agreed to in your contract, you can choose to pursue legal action against your client.

As you review these best practices, compare them to your existing policy. What needs to be changed? What can be updated? Where do you see the most success? Remember, be clear, be firm, and use a contract for practice success!



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Tips & Tales

by
Kara Evans



Income strategies with IRAs

The tale: Your good friend and client, Isabelle Roth, comes to you for advice. Her husband, Ira, is ill and needs nursing home care. He has two traditional Individual Retirement Accounts and one Roth IRA. Isabelle wants to know how these IRAs factor into her husband's Medicaid application.

The tip: Some assets are excluded from being counted toward the asset limit. We already know that a client can keep his or her homestead property, have an automobile, and own a burial plot and a prepaid funeral contract. Some items that we typically think of as assets are treated as income, such as rental property and retirement funds. Retirement funds are work-related annuities or investment accounts whose purpose is to provide an income stream when a person retires. These investment accounts include pension funds and Individual Retirement Accounts (IRAs). If an individual receives regular payments from these funds, the payments are income and the underlying value is ignored. If an individual is able to receive regular payments but chooses not to take them, the investment account will be treated as an asset (see 1640.0505.04 Access Florida Program Policy Manual).

Pension funds are almost always paid monthly, similar to social security, and may even have federal tax or health insurance premiums withheld. The Internal Revenue Service has determined that IRAs must be paid out over a life expectancy and must start in the year the individual turns 70½. They can be paid out monthly, quarterly, or annually. This payment

is called the required minimum distribution (RMD). The Internal Revenue Service's RMD rules do not apply to Roth IRAs. However, the Medicaid rules do, and so your client must take some kind of regular payment from the Roth, or it will count as an asset.

Taking the RMD monthly is probably the easiest for your client. This way, there is a set amount each month to be counted as part of the patient responsibility and paid to the nursing home. However, in Isabelle's case, her husband's RMDs will give him too much income. He will exceed Florida's income cap and will need a qualified income trust. Isabelle is applying retroactively, and the extra monthly income will mean that she cannot qualify for the past three months. Furthermore, Ira and Isabelle have always taken the entire distribution annually, but only from the traditional IRAs. They have never taken a distribution from the Roth IRA.

The Access Florida Program Policy Manual discusses how to count income to determine the patient responsibility at 2440.0512. Mr. Roth is applying for February. The manual states that if income is to be prorated, it should be prorated in the month it is received. For example, Mr. Roth's RMDs are paid in December. Following 2440.0512, the December income will not be counted in calculating his patient responsibility for February through November. When he receives his RMD payment in December, only then will the RMD be prorated going forward to be counted a part of his patient responsibility. Mr. Roth will not need a qualified income trust until December.

The Roth IRA is a bit different. Isabelle and Ira have never taken a distribution from this investment and so cannot prove that regular payments are being made. However, they also do not have to use the IRS life expectancy tables to calculate how much to take. Ira can start taking small distributions immediately from the Roth IRA to comply with the regular payment requirement without increasing his income to the point that he will exceed Florida's income cap.

Always review your client's distributions from their retirement funds. There are pitfalls as well as planning opportunities hiding there. Many clients have multiple IRAs but lump all the RMD amounts together and take them from a single IRA rather than from multiple IRAs. The IRS allows this, but Medicaid does not. The client must take regular distributions from each IRA. Some clients take more than the required amount for tax planning purposes. If those funds must be paid to the nursing home, it may be in a client's interest to reduce the distributions to the minimum. Strategies such as delaying the entire distribution to the end of the year may help the community spouse if the institutionalized spouse passes away during the year. This is another area where your knowledge can add value for your client.

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TAX TIPS

by Michael A.
Lampert



529 plans: Some new flexibility and traps

Traditionally, Section 529 plans were only for college savings. The law allows withdrawals from the plan without federal income tax or penalties if used for college expenses. College expenses can include not only tuition, but also room and board, textbooks, and many fees.

Recent changes to the Section 529 law now allow withdrawals to pay for kindergarten through 12th grade costs. However, for pre-college, the tax- and penalty-free withdrawals can only be used for tuition rather than the broader list of allowable college expenditures. Also, there is a \$10,000 per year, per pre-college student limit.

Possible multi-state trap: For states with an income tax, make sure that the state has modified the state

income tax law to match the federal law. If it has not, there could be a nasty state income tax bite on the withdrawal.

Non-tax trap: Most primary schools do not look at 529 plans when making financial aid determinations. Will this change?

Planning tip: 529 accounts owned by a parent are factored into college financial aid decisions (although generally less than if the child owns the account). However, if a grandparent owns the account, it is not factored into financial aid. Remember that when the funds are actually used for allowable expenses, it is generally considered income for financial aid purposes. If the client waits until after the first of the year of the grandchild's second school year, the

"income" usually will not be considered because financial aid is generally based on the "prior prior" period.

Planning tip: The annual contribution limit is per beneficiary. This is why it is usually easier to have separate accounts for each beneficiary; and you can only have one beneficiary of a specific 529 plan at a time. However, this does lead to some flexibility because the plan owner can change beneficiaries from one beneficiary, such as a child or a grandchild, to the next, due to changing circumstances.

Planning tip: Sometimes it is simpler to have a client establish a 529 plan for a grandchild rather than setting up and administering a trust for a relatively nominal amount of assets.

Beware of private tax debt collectors

This is at least the third time that the Internal Revenue Service has implemented private debt collections. After putting off implementation of this third iteration, the IRS has begun yet again to utilize private debt collectors as required by Congress in 2015. The delay was understandable since during each of the prior times it was implemented, the program cost more to run than it collected.

Currently there are four IRS-approved collections agencies in the private debt collection program. These collectors can implement installment agreements with taxpayers but have

no collection enforcement authority. For example, they cannot issue liens or levies.

The taxpayer advocate has again complained about the program. As reported recently in *Tax Pro Today*, she notes that the collectors are harassing taxpayers. She also notes that in a survey of more than 4,000 taxpayers who entered into an installment agreement using one of the private debt collectors, 44% had income below 250% of the federal poverty level, 28% had income below \$20,000, and 19% had income below the federal poverty level.

Further, because the private collector can keep up to 25% of what is collected, the National Treasury Employees Union believes that the program again is costing more than it is saving.

Why is this an elder law tax tip? It is often the most vulnerable who succumb to the private collection agency's pressure. Low income seniors are particularly vulnerable to pressure from the IRS-approved private debt collectors, believing they have to enter into a payment agreement "or else," even if it means foregoing food or medicine.

We all know about the fraudsters who call claiming to be from the IRS, threatening arrest and other sanctions if the taxpayer does not pay the IRS impersonator. In response to these fraudsters, the IRS publicly states that the IRS will not call taxpayers demanding payment. Yet the private debt collection program sends out a written notice to the taxpayer and then the collections calls can start. So, your clients can receive calls after a letter, which may or may not have been received by the client and which may or may not be from a fraudster. Even if the letter

is authentic, is the subsequent call from an IRS-contracted private debt collection agency or, instead, from a fraudster who got lucky and is calling someone who really owes back taxes (as many of the author's tax clients do)?

Practice tip: The private collection agencies have no collection enforcement authority. They are subject to the Fair Debt Collection laws and procedures. Do not let your clients be pushed around. There is no obligation to deal with the private collectors.

Practice tip: If you notice that your

client has an established installment agreement to pay back taxes, look at the client's overall situation, taking into account age, health, finances, etc. Does the payment amount seem reasonable or oppressive? If the latter, consider having the client's unpaid tax situation evaluated.

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Fair Hearings Reported

by Diana Coen Zolner

Petitioner v. Florida Department of Children and Families, Appeal No, 18F-02780 (Filed June 20, 2018)

At issue was the department's action denying the petitioner's application for Medicaid nursing home benefits because the durable power of attorney (DPOA) did not give the petitioner's agent the authority to create a pooled trust. The petitioner carried the burden of proof by preponderance of the evidence.

The petitioner applied for Institutional Care Program (ICP) Medicaid benefits. The respondent requested that the petitioner submit copies of pooled trust bank statements. Upon receipt of the statements, the respondent sent the pooled trust documents to regional counsel for evaluation. Regional counsel responded that the pooled trust documents were not acceptable, stating that Section 24(b) of the DPOA does not grant the power to the agent to execute a trust on behalf of the settlor/grantor. The petitioner's application was denied.

Counsel for the petitioner inquired as to the reason for the denial and was advised that the application was denied because regional counsel had decided the DPOA submitted did not allow the agent to set up a trust. In response, the petitioner's counsel asserted that the agent under the DPOA did not and cannot create a pooled trust because pursuant to law, only a nonprofit can create a pooled trust. The petitioner's counsel argued that the agent entered into a joinder agreement to establish a subaccount under the pooled trust, which then allowed her to fund said subaccount under the pooled trust agreement. Rather than creating a trust, the petitioner's counsel asserted that the agent signed a contract to enter into a pooled trust that was already created. The respondent's counsel argued that the signing of a joinder

agreement creates a pooled trust and that paragraph 24b of the DPOA prohibits the petitioner's agent from creating a trust.

The DPOA authorized the petitioner's agent to act with full power to do anything necessary in exercising any of the powers granted therein (1), enter into contracts and agreements (5), deal with banks (6), arrange and pay the costs of medical care, explicitly mentioning nursing homes (8), make application for any government benefits (19), and make investments deemed proper and to add assets to investments (23). The DPOA also restricted the agent from executing a trust on the petitioner's behalf (24b). Pursuant to Section 709.2208(2)(a), Florida Statutes, "A power of attorney ... grants general authority to ... buy, sell, and exchange investment instruments." Pursuant to Section 709.2208(2)(f), Florida Statutes, Banks and other financial institutions, "investment instruments" means "... a statutory or common law business trust, a statutory trust ... common fund trust funds" thereby granting the petitioner's agent authority to invest in an already existing trust. Furthermore, Section 709.2201(4), Florida Statutes, Authority of agent, states "... if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls."

Paragraph 24 of the DPOA stated explicitly that the agent cannot create a trust; however, paragraph 23 gave the agent the power to make any investment she deemed proper and to add assets to said instrument. The hearing officer found that to the extent paragraph 24 is ambiguous as to whether or not creating a trust is the same as investing in an existing trust, 709.220(4) says to construe the ambiguity as granting the broader authority, not the more restrictive.

As a result, the hearing officer concluded that the single statement in paragraph 24b prohibiting the creation of a trust was a more restrictive power when considering that elsewhere in the DPOA the agent was authorized to handle the petitioner's health care, enter contracts and agreements, apply for government benefits, and make investments the principal deemed proper. Additionally, the DPOA gave the agent the power to execute the contract to form the subaccount under the pooled trust, which became the vehicle for funding the trust. Therefore, the hearing officer determined that the petitioner's agent had the authority to establish and fund the subaccount, incorporating the terms of the pooled trust by reference, and met the burden of proof by a preponderance of the evidence. The petitioner's appeal was granted.

Petitioner v. Florida Department of Children and Families, Appeal No, 17F-03258 (Filed Oct. 18, 2017)

At issue was whether the department's action to terminate the petitioner's Home and Community Based Services (HCBS) Medicaid waiver was proper. The respondent carried the burden of proof by preponderance of the evidence.

The petitioner was an assisted living facility (ALF) resident whose HCBS Medicaid waiver benefits were up for recertification. The petitioner faxed the recertification application to the department, and the department responded with a request for current bank statements. The department did not receive the petitioner's bank statements by the due date. As a result, the department issued a notice of case action (NOCA) notifying the petitioner that her Medicaid benefits would end the following

continued, next page

month because the statements were not timely submitted. The petitioner admitted that the statements were not submitted by the required date, but were subsequently emailed to the department.

The petitioner's bank statements were in the name of the petitioner and her daughter. The account balances for the months in question totaled between approximately \$12,000 and \$19,000. The asset limit for an individual to be eligible for the HCBS Medicaid waiver is \$2,000. Therefore, the respondent determined that the petitioner's bank account was over the asset limit and the petitioner was not eligible for continued benefits.

The petitioner asserted that she received "back pay" from the Veterans Administration (VA) in January and February 2017, which was the reason for the high bank account balances. The petitioner further claimed that the money she received from the VA was for "back rent" owed to the ALF and therefore did not belong her. The petitioner also alleged she wrote checks to the ALF from the account in question; however, the checks were not signed and delivered to the ALF because the petitioner was in and out of the hospital between January and March 2017 and her daughter was out of the country. The petitioner converted the unsigned checks to cashier's checks payable to the ALF in June 2017.

The respondent determined that the petitioner met the HCBS Medicaid waiver asset limit in June 2017, when the cashier's checks were created. The respondent agreed to approve recertification of the petitioner's HCBS Medicaid waiver effective June 2017. The petitioner continued to assert that she was eligible for recertification effective April 2017 because the funds in her bank account belonged to the ALF for "back rent" and did not belong to her.

Florida Administrative Code R. 65A-1.303, Assets, in part states: "(2) Any individual who has the legal ability to dispose of an interest in an asset owns the asset" and "(3) ... Assets are considered available to an individual when the individual has unrestricted access to it." In accordance with this authority, the hearing officer found that all of the funds in the petitioner's bank account were to be counted against her as an asset, regardless of the purpose of the funds. As a result, the appeal was denied and the respondent's actions to terminate the petitioner's HCBS Medicaid waiver were proper.

Petitioner v. Florida Department of Children and Families, Appeal No. 17F-03257 (Filed Sept. 18, 2017)

At issue was whether the department's action to deny the petitioner's Home and Community Based Services (HCBS) Medicaid waiver for March 2017 through May 2017 was proper. The respondent had the burden of proof by preponderance of the evidence.

The petitioner resided in an assisted living facility (ALF) and was up for renewal of her benefits. The petitioner's daughter completed the renewal paperwork, which was faxed to the department by Humana American Elder Care. The renewal listed the petitioner's mailing address as her daughter's address. The petitioner's income consisted of \$1,276 in social security (SSI), \$361.65 in pension benefits and \$1,153 in Veterans Affairs (VA) benefits. The department calculated the petitioner's total income to be \$2,790.65, which was over the HCBS income limit of \$2,205. As a result, the department issued a notice of case action (NOCA) notifying the petitioner that her benefits would end on Feb. 28, 2017, due to her unearned income increase.

The petitioner asserted that the department only notified Humana American Elder Care that the petitioner's benefits would be ending in February 2017 and that neither

the petitioner nor her daughter was aware that the petitioner's Medicaid would end in February. The respondent contended that notice of the ending date was sent to the petitioner's daughter's address.

The petitioner's representative asserted that the \$1,153 for VA income was incorrect because it included VA Aid & Attendance income. On the day of the hearing, the petitioner's representative faxed the department a letter from the VA listing \$432 as Aid & Attendance and \$721 as basic pension, making the petitioner's unearned income \$2,358.65 per month. The respondent stated that even with the decrease in income, the petitioner's monthly income was still over the limit of \$2,205 per month. In response, the petitioner alleged that her daughter was never informed by the department that a qualified income trust (QIT) was required for the petitioner to be eligible for HCBS Medicaid. The respondent's representative stated that a QIT was established on Feb. 26, 2017, but that it was not funded until May 30, 2017. Since the QIT was not funded until May 30, 2017, the respondent determined the petitioner eligible for HCBS effective June 2017. The petitioner's representative disagreed that the petitioner was only eligible effective June 2017.

Florida Administrative Code R. 65A-1.713, SSI-Related Medicaid Income Eligibility Criteria, states in pertinent part: "(1) ... An individual's income must be within limits established by federal or state law and the Medicaid State Plan"; "(2)(d) Income placed into a qualified income trust is not considered when determining if an individual meets the income standard ..."; and "(4)(b)(1) To determine if the individual meets the income eligibility standard the client's total gross income, excluding income placed in qualified income trusts, is counted in the month received. The total gross income must be less than the institutional care income standard for the individual to be eligible for that month"

The hearing officer found that based on the evidence submitted, the petitioner's income trust was not funded until May 30, 2017. Therefore, the petitioner was over the HCBS income limit until June 2017. Based on this evidence and careful review of the cited authority, the hearing officer concluded that the respondent's action to deny the petitioner HCBS Medicaid for March 2017 through May 2017 was proper.



Diana Coen Zolner, Esq., graduated from Touro College, Jacob D. Fuchsburg Law Center in May 2001. After graduating law school, she worked as a prosecutor for the District Attorney's Office, Suffolk County, New York, from 2001 to 2002.

She then transitioned to private practice as an associate attorney, practicing in the areas of elder law, wills, trusts, estates, and guardianships from 2002 to 2008 in Stony Brook, N.Y. In September 2008, she moved to Florida to enjoy the sunshine and continued to practice in the areas of wills, trusts, and estates. She is a Florida board certified elder law attorney employed with Brandon Family Law Center LLC in Brandon, Fla.



Summary of selected case law

by Diane Zuckerman

Sufficient response to petition for administration

William Crescenzo, Appellant, v. Irene Simpson, as personal representative of the Estate of Herminia M. Quinones, deceased, Appellee, Case No. 2D16-5649 (2nd DCA 2018)

Issue: Is the filing of an answer and affirmative defenses alleging undue influence a sufficient response to a petition for administration, thus preventing the court from admitting the will to probate without a hearing?

Answer: Yes

This case supports the proposition that will contests should be resolved by the court prior to the court appointing a personal representative and admitting a will to probate. Five years after the decedent Quinones died, Irene Simpson filed a petition for administration of her estate, requesting appointment as personal representative and admission of the decedent's will naming the decedent's sister and niece as beneficiaries. The sole asset of the estate was a parcel of real property.

Appellant Crescenzo filed an answer and affirmative defenses to the petition for administration. The

answer asserted that the appellant was a 50% owner of the sole asset and that the will had been procured through fraud and undue influence.

Without a hearing, the trial judge entered an order admitting the will to probate, and despite appellant Crescenzo's answer, the judge noted that no objection had been made to the will's validity.

The issue considered by the Second DCA was whether the appellant had sufficiently presented the will challenged to the court so that the court was required to rule on the issues prior to signing the order admitting the will.

The court analogized Fla. Prob. R. 5.260 and Section 731.110(3), Florida Statutes, which govern caveats. When a caveat is filed, the court is prohibited from admitting a will to probate until parties are properly noticed and have an opportunity to participate. In this case, the appellant was not given an opportunity for a hearing, despite filing a pleading that clearly reflected his interest in the case. The court stated that the appellant's answer and affirmative defenses, although not titled as a caveat, were the functional equivalent of one, which served

to notify the court of the party's rights to be heard. The Second DCA reversed and remanded.

In its ruling, the court cited to Fla. Prob. R. 5.020(a) governing pleadings, affirming generally that a defect in the form of pleadings should not impair a litigant's substantial rights.

Practice tip: This case is useful when arguing that your client has substantive rights in response to a technical argument by opposing counsel that a probate procedure was not strictly followed.

Entitlement to attorney fees

Michael J. Schlesinger etc. et al, Appellants, v. Anita Jacob, Appellee, Case No. 3D16-2314 (3rd DCA, 2018)

Issue: In a guardianship case, does the filing of a petition to determine incapacity and the filing of a petition to appoint a guardian benefit a ward and thus entitle the attorney to fees under Section 744.108(1), Florida Statutes?

Answer: Yes

The ruling in this case adds to the growing trend of awarding fees under Section 744.108(1), Florida

continued, next page

Statutes, using the accepted case law standard that the legal service must “benefit the ward.” The dissenting opinion points out that the statute does not contain the requirement of “benefitting the ward” before fees are recoverable. Nonetheless, the courts have used this standard.

The appellants, two law firms, appealed the trial court’s order denying their motion for attorney fees under Section 744.108(1). In rejecting the motion, the trial court concluded that none of the legal services provided to the ward by the appellants benefitted the ward.

However, the Third DCA held that the trial court’s conclusion was not supported by substantial competent evidence. The record reflected that the initiation of the guardianship proceeding by the filing of the petition to determine incapacity and the petition to appoint a guardian, which the trial court granted, did indeed benefit the ward, who needed the protection of the guardianship proceeding.

The case also cited to a number of other cases that define the legal services that have been determined to have “benefitted the ward.”

Practice tip: This case adds to the growing body of law under Section 744.108 for guardianship attorneys who seek to have their fees paid pursuant to this statute.

In re Guardianship of Donald H. Jones, an incapacitated person, Michael C. Lyublanovitz, Appellant, v. Nancy L. Zebny, as guardian of Donald H. Jones, an incapacitated person, Appellee, Case No. 2D17-2237 (2nd DCA 2018)

Disqualification from serving as permanent plenary guardian

Issue: Is a professional guardian who serves as an emergency temporary guardian disqualified from serving as a permanent plenary guardian under Section 744.312(4)(b), Florida Statutes?

Answer: No

This case concerns the interpretation of Section 744.312, Florida Statutes, involving the appointment of a guardian. In this case, a professional guardian had been appointed as the temporary emergency guardian. At the contested hearing to appoint a plenary guardian, the trial court appointed the same professional guardian who had served as the temporary emergency guardian. The appellant filed an appeal, arguing that Section 744.312(4)(b) prevented the appointment. That statute provides:

An emergency temporary guardian who is a professional guardian may not be appointed as the permanent guardian of a ward unless one of the next of kin of the alleged incapacitated person or the ward requests that the professional guardian be appointed as permanent guardian. The court may waive the limitations of this paragraph if the special requirements of the guardianship demand that the court appoint a guardian because he or she has special talent or specific prior experience. The court must make specific findings of fact that justify waiving the limitations of this paragraph.

The court relied on the final sentence of the above provision, stating that the limitations imposed can be waived by the court if the court makes specific findings of fact to justify the waiver.

The Second DCA noted that the trial court had held an evidentiary

hearing and provided a detailed order finding that the professional guardian had special skill sets. The court noted that the guardian had been a case manager, was a social worker, held a master’s degree, and had other expertise.

The district court concluded that the trial court had not abused its discretion in appointing the temporary emergency guardian as the permanent plenary guardian.

Practice tip: This case is helpful to attorneys who seek to avoid the limitation on appointment of a professional guardian. The attorney should make sure that the order makes specific findings of the “special talents” or “specific prior experience” of the professional guardian to withstand an appellate challenge.



Diane Zuckerman is AV rated by Martindale-Hubbell. She received the BS degree in nursing from the University of South Florida and the JD from the University of Florida, Levin College of Law. Her education in nursing and law gives her unique insight into the interface between the two disciplines and helps her to be a knowledgeable practitioner. She is a member of the Elder Law and the Real Property, Probate and Trust Law sections of The Florida Bar and the Hillsborough County Bar, and she is active in Kiwanis. Diane spent many years as a litigation attorney, and practices trust and estate litigation, guardianship, estate planning, and probate administration.





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