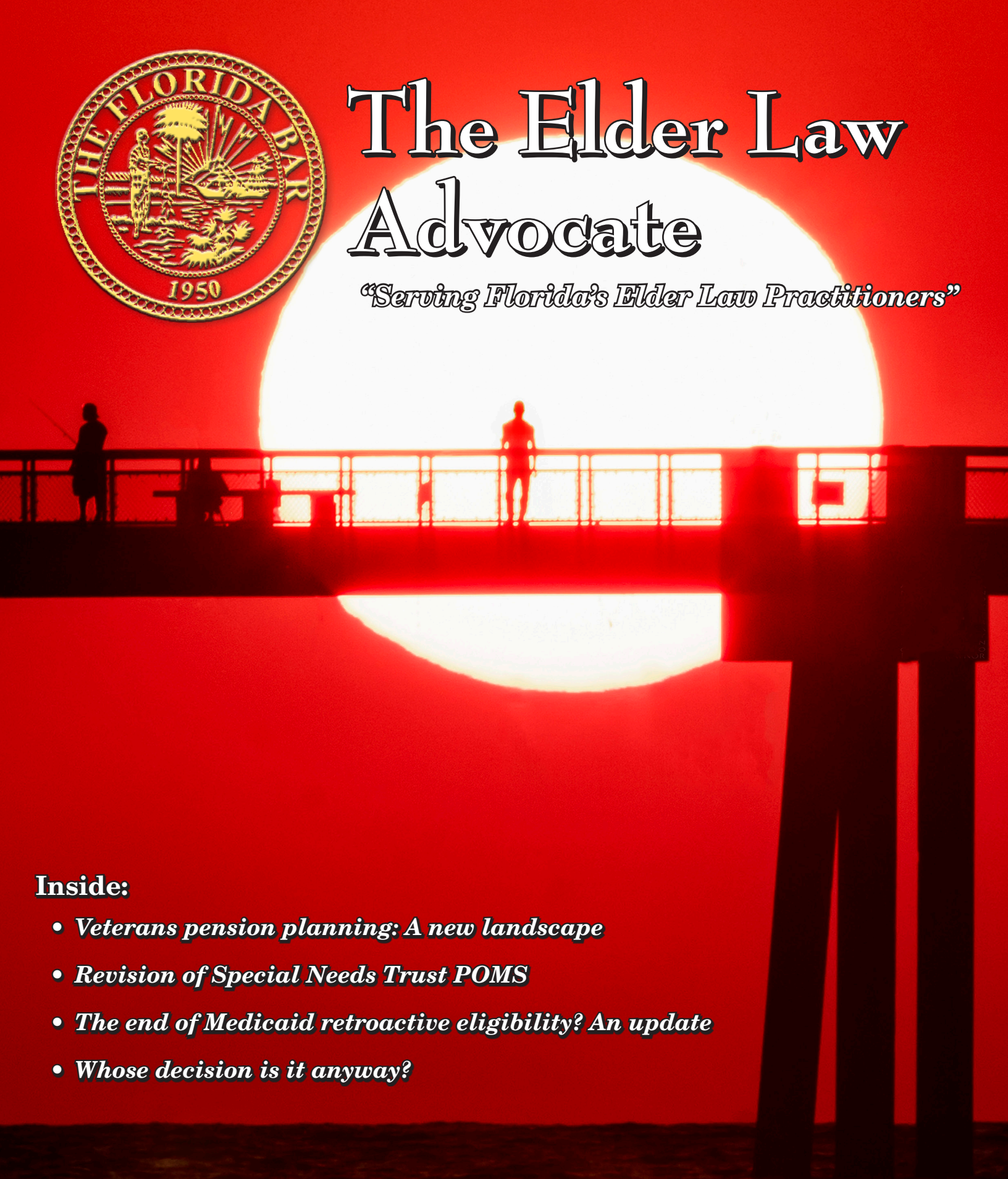
The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"



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- *Whose decision is it anyway?*

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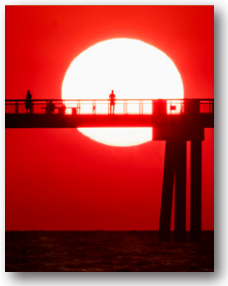

COVER ART

Destin Sunset
Randy Traynor Photography

1/2019

Contents:

The deadline for the SPRING 2019 EDITION: March 1, 2019. 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

Defining our target

You can't hit a target you don't have – Zig Ziglar

As a child, my favorite time of the year was Christmas; today, it is the first of the year. For whatever reason, it seems like we get a fresh start on January 1. I am not a person who makes a list of resolutions; however, I do review my goals from the prior year and make adjustments for the upcoming year. I believe goal setting is the critical piece for those attempting to accomplish big projects. Three years ago, past section chair David Hook put together a strategic planning meeting for the Elder Law Section. Following the meeting, the section knew what its goals would be for the coming year(s). Just as important, we knew what we would *not* be working on. Making those decisions gave our section the freedom to really dig into those projects we identified as most important.

Let me give you an example: a constant question before the leadership was "Should the section work on marketing materials and programs for our members?" If we decided to undertake this endeavor, we knew we would need to retain a marketing expert to help us. We also knew that other groups, such as AFELA, were already providing some of these products and services. To help guide our decision, we reviewed the Bar's purpose:

> The Florida Bar's core functions are to: Regulate the practice of law in Florida; ensure the highest standards of legal professionalism in Florida; and protect the public by prosecuting unethical attorneys and preventing the unlicensed practice of law.

We then looked at our mission statement:

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

After discussing the issue, the group reached the conclusion that our focus is promoting knowledge and advocacy of the laws and regulations our members must understand to be competent elder law attorneys. Working on how to market a practice does not further our charge from The Florida Bar. With a clear understanding of our goals (or target), we were able to save the funds we would have otherwise spent and redirect those resources to furthering our mission.

So, what do we have planned for 2019? In short, education and advocacy.

The year begins with the three-day Annual Update in Orlando. This educational event provides a primer and a deeper dive into the advanced areas of the elder law practice.

The 2019 Legislative Session will convene on March 5; however, activity within the legislative cycle has already started. Our Legislative Committee, chaired by William Johnson and Shannon Miller, has been hard at work getting ready for the upcoming legislative session. Our section is already active in trying to shape several bills. Our Legislative Committee is always in need of help. If you are interested in helping craft the laws coming toward your practice, you may want to jump on this committee.

The Special Needs Trust Committee will host a CLE on March 22 in Tampa. There have been more changes to the POMS than can be covered at the Annual Update alone. Travis Finchum and Howard Krooks are putting together a great one-day program. If your practice touches on special needs trust planning, you should plan to attend this CLE.

In June, we will host a CLE during The Florida Bar Annual Convention (likely on June 27 or 28). This year the convention will be in Boca Raton, and the Guardianship Committee will be presenting information on changes to the guardianship laws and regulations. The Legislature has been active within the guardianship arena for the past couple of years. This year looks to be the same. For those who handle guardianship matters, attendance at this CLE should be considered a must.

Each fall, the section takes off to an interesting locale for our Annual Retreat. This year we traveled to

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Chair's message. . .
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Washington, D.C. We heard from Erica Wood with the ABA on national trends in guardianship; David Goldfarb, senior public policy manager with NAELA, on what is pending in Washington, D.C. (beyond the Supreme Court nomination, which came down while we were there); and Jim Wolverton from ElderCounsel, who helped us understand the benefits of team building. We also participated in several fun team-building activities, like a scavenger's hunt throughout the National Mall. It was a great opportunity for section members to get to know one another better while learning.

As you plan out your 2019, I hope you will keep these dates and events in mind. I look forward to seeing you soon!

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Committees keep you current on practice issues

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

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SECTION NEWS

Mark your calendar!

March 22, 2019
Elder Law Section
Full-Day CLE Course 3098R
Special Needs Trusts in Florida (Part 2)
Administration Issues
Tampa Airport Marriott Hotel

June 26-29, 2019
Annual Florida Bar Convention
Boca Raton Resort & Club
Note: The ELS will sponsor a half-day CLE on guardianship and will cosponsor a full-day CLE with The Florida Bar Consumer Protection Committee.
Dates TBA

October 2019
Elder Law Section Annual Retreat
Sonoma Valley, California
Dates TBA

Capitol Update

by Brian Jogerst

After the election ...

The 2018 elections are behind us. Once again the statewide races were decided by a narrow margin—less than 1% of the total vote. Prior to Election Day, more than 5 million early and mail-in votes were cast of the 8 million total votes cast in this midterm election.

Several races were close enough to necessitate a recount, including those for Florida's U.S. Senate seat, governor, and agriculture commissioner, along with Florida House and Senate seats.

Now that the recounts are over in the Florida House of Representatives, three Republican incumbent House members and two Democrat incumbent House members were not reelected. Overall, 42 new members were elected to the House of Representatives. In the Florida Senate, the Democrats were able to flip one seat, and the Senate will have nine new members. In addition, Governor DeSantis has appointed three current House members to positions in his administration, so three special elections will be held in early 2019.

Looking back:

Elder exploitation law—it's working

During the 2018 Legislative Session, the ELS and AFELA were actively engaged with Senator Kathleen Passidomo (R-Naples) and Representative Colleen Burton (R-Lakeland) on legislation 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. Working with the RPPTL Section, the Florida Bankers Association, and the clerks of court, along with the support of AARP and the Florida Sheriffs Association, we were pleased with the overwhelming and bipartisan legislative support. We were also grateful that Governor Scott signed the legislation into law.

Since that time, several attorneys along with private citizens have accessed the courts because of this new law to file an injunction preventing a vulnerable adult's money and assets from being stolen.

Thank you again to Senator Passidomo and Representative Burton—and all groups who supported this new law—because it is working to protect our vulnerable citizens.

Elder exploitation training

As noted in previous articles, the ELS and AFELA will be conducting training seminars throughout Florida to help train and to assist local organizations and other elder law attorneys so that our vulnerable adults can benefit from this new law.

For more details on the seminars or to ask to schedule a seminar, please contact:

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shannon@millerelderlaw.com

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Looking ahead:

2019 Legislative Session

The Legislature returned to Tallahassee on November 20 for its organizational session. Senator Bill Galvano (R-Bradenton) was sworn in as Senate president, and Representative Jose Oliva (R-Miami Lakes) was sworn in as House speaker. Senator Audrey Gibson (D-Jacksonville) was sworn in as the Senate democratic leader and Rep. Kionne McGhee (D-Cutler Bay) was sworn in as the House democratic leader.

The House and Senate committee chairs and memberships were announced. Chairs of interest include:

- Senator Rob Bradley (R-Orange Park), Senate Appropriations
- Senator Aaron Bean (R-Fernandina Beach), Senate Health and Human Services Appropriations
- Senator Gayle Harrell (R-Stuart), Senate Health Policy
- Senator David Simmons (R-Longwood), Senate Judiciary
- Rep. Travis Cummings (R-Orange Park), House Appropriations
- House Speaker Pro Tem MaryLynn Magar (R-Hobe Sound), House Health Care Appropriations
- Rep. Ray Rodrigues (R-Ft. Myers), House Health and Human Services
- Rep. Cary Pigman, M.D. (R-Sebring), House Health Market Reform Subcommittee
- Rep. Colleen Burton (R-Lakeland), House Health Quality Subcommittee
- Rep. Paul Renner (R-Palm Coast), House Judiciary
- Rep. Bob Rommel (R-Naples), House Civil Justice Subcommittee

For a full listing of all House and Senate Committee assignments, please follow these links:

House committees: *myfloridahouse.gov / Sections / Committees / committees.as*px

Senate committees: *flsenate.gov / Committees*

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After the election ...
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In addition, legislators will begin filing legislation for 2019, which will be analyzed and reviewed by ELS and AFELA *(see below)*.

In preparation for the 2019 Legislative Session, the House and the Senate will be hold committee meetings in January and February in advance of the 60-day legislative session beginning on Mar. 5, 2019.

Legislative Committee

The Legislative Committee, along with the chairs of the ELS substantive committees, actively reviews all bills that are filed and will provide comments to the sponsors and interested groups. The committee meets *every other* Friday prior to session and then *every* Friday during session. Committee members are reviewing potential legislation for the 2019 session, including guardianship revisions. In addition, we anticipate that several bills from the 2018 session will return for the next session, including the following:

- **Vulnerable adults/security dealers** – Provides financial institutions the ability to put a temporary hold on a transaction if they suspect exploitation.
- **Remote notarization/electronic wills** – This is the third session to address e-wills. We will continue working ensure that if a bill is passed, sufficient safeguards are included to protect vulnerable adults.
- **Financial institution payments to surviving successors** – Provides financial institutions the ability to pay to surviving successors.

If you want to participate on a substantive committee and also review/comment on the bills that are filed, please contact the co-chairs of the ELS Legislative Committee:

Bill Johnson
wjohnson@floridaelderlaw.net
Shannon Miller
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Finally, we have enjoyed success on legislative issues by working with legislators and providing feedback to them, as well as by testifying at committee hearings. We are also grateful for the grass-roots support we have received and for the difference that makes when working with legislators.

You can help by working with your local legislators and being a local resource to them. If you do not know your legislator, we remain willing to help facilitate an introduction with the legislator and his or her staff.

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

Visit the Elder Law Section on Facebook

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

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

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

If you have any suggestions or would like to help with this social media campaign, please contact Larry Levy at 954/634-3343 or *larry@lawrencelevypa.com*, or Alison Hickman at 904/264-8800 or *alison@floridaelder.com*.

THE FLORIDA BAR
ELDER LAW SECTION

Veterans pension planning: A new landscape

by Javier A. Centonzio

After three years of uncertainty, the U.S. Department of Veterans Affairs (VA) finally released the final rule changes to its VA pension benefit (commonly and incorrectly referred to as Aid & Attendance).[1] The proposed rule change was met with some stiff opposition, and the VA received more than 850 comments during the 60-day public comment period. As many feared, the VA decided to implement a "look-back" period for asset transfers and a penalty period for transfers made during that period; however, the VA rule changes also provided some clarity and guidance on asset limits and medical expenses.

The planning landscape for long-term care benefits has changed. As elder law attorneys, it is important that we keep informed of these changes so we can adjust accordingly to best represent all of our clients. The new rules became effective on Oct. 18, 2018, and are not retroactive in nature for claims made before that date. For purposes of this article, we will focus on and discuss the changes to the VA pension program that will most affect planning and eligibility for benefits.

Net worth

The final rule establishes a net worth limit equal to the maximum community spouse resource allowance (CSRA) for Medicaid purposes (currently $123,600).[2] This limit is subject to increase by the same percentage as the cost-of-living increase for Social Security benefits. Net worth is defined as the sum of the claimant's assets and annual income.

Net worth determinations will be made as of the date of: 1) the original claim; 2) a new claim made after a period of non-entitlement; 3) a request to establish a new dependent; or 4) receipt of information by the VA that a claimant's net worth has changed.[3]

Assets

A veteran's assets include the assets of the veteran as well as the assets of his or her spouse if the veteran is married.[4] A surviving spouse's assets only include the assets of the surviving spouse.[5]

The value of a claimant's primary residence will not be considered an asset, even if the residence is vacant.[6] If a claimant does not reside in his or her primary residence and is receiving rental income from that residence, then that income will be counted as income for VA purposes but the residence will still not count as an asset. If the primary residence is sold, the proceeds from the sale must be used to buy another residence within the same calendar year in order not to be considered an asset.

The value of personal effects suitable to and consistent with a reasonable mode of life, such as family transportation and appliances, are also excluded as assets.

Decreasing assets

Under the new rule, a veteran, surviving spouse or child, or someone acting on his or her behalf may decrease assets by spending them on an item or service for which fair market value is received unless the item or items purchased are themselves part of net worth.[7]

Look-back period

The new rule establishes a 36-month look-back period for VA pension claims.[8] The look-back period begins on the date on which the VA receives a pension claim and includes the 36 months immediately preceding the date of the received claim. Most importantly, this does not include transfers made prior to Oct. 18, 2018.

Covered asset

When deciding whether an asset transfer was allowable within the 36-month look-back period, the VA first determines if the transferred asset was a "covered asset." A covered asset is an asset that was part of the claimant's net worth, was transferred for less than fair market value,[9] and if not transferred, would have caused or partially caused the claimant's net worth to exceed the net worth limit.[10]

Transfers for less than fair market value are defined as: 1) selling, conveying, exchanging, or gifting an asset for an amount less than fair market value of the asset; or 2) a voluntary asset transfer to, or purchase of, any financial instrument or investment that reduces net worth by transferring the asset to, or purchasing, the instrument or investment unless the claimant establishes that he or she has the ability to liquidate the entire balance of the asset for the claimant's own benefit.[11]

Annuities and trusts are specifically identified and defined as instruments and investments covered under the new rule as transfers for less than fair market value.[12] It is important to note, however, that annuities or trusts that allow the claimant to liquidate the entire balance for the claimant's own benefit are not considered transfers for less than fair market value.[13] The VA also included in the final rule an exception for transfers where an asset was transferred as the result of fraud, misrepresentation, or unfair business practices related to the sale or marketing of financial products or services for purposes of establishing entitlement to a VA pension.[14]

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Veterans pension planning

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Penalty period

Under the new rule, the transfer of a covered asset during the 36-month look-back period will trigger a penalty period of up to five years.[15] The penalty period will begin on the first day of the month that follows the date of transfer or, if there was more than one transfer, the first day of the month that follows the date of the last transfer.[16] The claimant will be considered eligible for benefits effective the last day of the last month of the penalty period, with a benefit payment date on the first day of the following month.[17]

Curing or reducing the penalty period

The VA also provides a way to reduce or cure a transfer of a covered asset during the 36-month look-back period. If the VA receives evidence that some or all of the claimant's covered assets were returned to the claimant before the date of claim or within 60 days after the date of the VA's notice to the claimant of the VA's decision concerning the penalty period, then the VA will recalculate or eliminate the penalty period.[18] The VA must receive the evidence regarding the return of the covered assets within 90 days from the date of the VA's notice to the claimant regarding its decision concerning the penalty period.[19]

Income for VA purposes

The new rule also provides new guidance on what the VA considers income and what it excludes as income for VA purposes (IVAP). Examples of what the VA will exclude from income are: 1) veterans' benefits from states and municipalities up to $5,000 per year;[20] 2) income tax returns;[21] 3) reimbursement payments for loss such as insurance settlement payments for accidents, theft or loss, or casualty losses;[22] and 4) certain statutory exclusions.[23] Waiver by a claimant of non-excludable income will be counted as countable income; however, a claimant who withdraws a claim for Social Security retirement benefits in order to maintain eligibility for unreduced benefits at a later age will not be considered as having waived income.[24]

Medical expenses

The VA's new rule defines what constitutes deductible medical expenses that reduce countable income for VA purposes (IVAP).[25] As always, payments for medical expenses must be unreimbursed to be deductible from income. Medical expenses for VA purposes are now defined as payments for items or services that: 1) are medically necessary; 2) improve a disabled individual's functioning; or 3) prevent, slow, or ease an individual's functional decline.[26] The items considered deductible medical expenses can be found at 38 CFR § 3.278 (c)(1) through (7).

Payments to hospitals, nursing homes, medical foster homes, and inpatient treatment centers (to include inpatient centers for drug or alcohol abuse) include the cost of meals and lodging charged by such facilities. Payments made for in-home assistance with activities of daily living (ADLs)[27] and instrumental activities of daily living (IADLs)[28] by an in-home attendant are considered deductible medical expenses as long as the attendant provides the disabled individual with health or custodial care.[29]

Additionally, the attendant providing in-home assistance must be a health care provider[30] unless: 1) the disabled individual requires aid and attendance or is housebound; or 2) a physician, physician's assistant, certified nurse practitioner, or clinical nurse specialist states in writing that, due to a physical, mental, developmental, or cognitive disorder, the individual requires the health care or custodial care that the in-home attendant provides.[31] This is very important to keep in mind when utilizing caregiver agreements as part of VA pension planning for your clients. If you are going to utilize such an agreement for the purpose of demonstrating a deductible medical expense, I would recommend that all claimants obtain a letter stating they require the type of custodial care the attendant provides.

Conclusion

The final rule presents some challenges for attorneys who want to assist veterans, and surviving spouses of veterans, to obtain eligibility for VA pension while simultaneously providing bright-line rules and predictability to a claims process that has been subjective and inconsistent at best. As elder

law attorneys dedicated to maximizing the benefits to which our clients are entitled, we will continue to seek methods to obtain eligibility to VA pension for our clients regardless of the obstacles put in our way.

We will learn more about how these rules will impact our planning as new claims are filed, adjudicated, and either granted or denied. This presents us all an opportunity to further expand the services we provide to our veteran clients and their loved ones. We must be ready to serve them now as they served us all before.

***Javier A. Centonzio, Esq.**, is the founder of Centonzio Law 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 Federal Register RIN2900-A073, Summary.
2 38 CFR § 3.274(a) and (b).
3 38 CFR § 3.274(e).
4 38 CFR § 3.274(c)(1).
5 38 CFR § 3.274(c)(2).
6 38 CFR § 3.275.
7 38 CFR § 3.274(f).
8 38 CFR § 3.276(a)(7).
9 38 CFR § 3.276(a)(4) defines fair market value as the price at which an asset would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. When determining fair market value, the VA will use the best available information such as appraisals, public records, and market value of similar property if available and applicable.
10 38 CFR § 3.276(a)(2).
11 38 CFR § 3.276(a)(5).
12 38 CFR § 3.276(a)(5)(ii).
13 *Id.*
14 38 CFR § 3.276(c).
15 Pursuant to 38 CFR § 3.276(e), the VA calculates the length of the penalty period by dividing the total covered asset amount by the monthly penalty rate, which is the maximum annual pension rate (MAPR) under 38 U.S.C. 1521(d)(2) for a veteran in need of aid and attendance with one dependent as of the date of the pension claim, divided by 12, and rounded down to the nearest whole dollar.
16 38 CFR § 3.276(e)(2).
17 38 CFR § 3.276(e)(3).
18 38 CFR § 3.276(e)(5)(2).
19 *Id.*
20 38 CFR § 3.272(k).
21 38 CFR § 3.272(r).
22 38 CFR § 3.272(s).
23 38 CFR § 3.272(t). The complete list of statutory exclusions can be found at 38 CFR § 3.279.
24 38 CFR § 3.271(i).
25 38 CFR § 3.278.
26 38 CFR § 3.278(c).
27 38 CFR § 3.278(b)(2) defines ADLs as basic self-care activities and consist of bathing or showering, dressing, eating, toileting, transferring (moving from one position to another, such as getting in and out of bed), and ambulating within the living area.
28 38 CFR § 3.278(b)(3) defines IADLS as independent living activities, such as shopping, food preparation, housekeeping, laundering, managing finances, handling medications, using the telephone, and transportation for non-medical purposes.
29 38 CFR § 3.278(b)(4) defines custodial care as regular assistance with two or more ADLs, or regular supervision because an individual with a physical, mental, developmental, or cognitive disorder requires care or assistance on a regular basis to protect the individual from hazards or dangers incident to his or her daily environment
30 38 CFR § 3.278(b)(1) defines a health care provider as: 1) an individual licensed by a state or country to provide health care in the state or country in which the individual provides health care to include physicians, physician assistants, psychologists, chiropractors, registered nurses, licensed vocational nurses, licensed practical nurses, and physical or occupational therapists; or 2) a nursing assistant or home health aide who is supervised by a health care provider.
31 38 CFR § 3.278(d)(2).

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.

Revision of Special Needs Trust POMS

Submitted by Travis D. Finchum, Co-Chair, Special Needs Trust Committee

The Social Security Administration has adopted new policy regarding the special needs trust (SNT) as of Apr. 30, 2018. These revisions to the POMS (Program Operations Manual System) were rewrites of SI01120.200, .201, .202, and .203. These can be found at *SSA.gov* and searching for SSI POMS.

Social Security officials said the rewrites were not implementing any new policies, but were more a clarification of existing policy. Some of the changes were more form over substance, updating definitions, removing tables of contents, etc., but several large "nuggets" of the rewrites could be fairly interpreted as a change in policy. Here are a few of those nuggets.

The Administration added in a 90-day grace period to fix just about any drafting problem with an SNT, provided the trust had been previously submitted to the Administration. Formerly this 90-day grace period was limited as to defective early termination clauses, sole benefit/travel issues, pooled trust management provisions, and null and void clauses. This further supports the premise that you must submit SNTs as early in the process as possible to be covered under this newly expanded grace period.

Veteran Survivor Benefit Plans were added to the list of income streams that can be legally assignable to a d4A or a d4C SNT, in addition to alimony and child support. This addition recognizes the Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year (FY) 2015 that amended the U.S.C. to permit the assignment of these benefit to SNTs. The Administration also clarified that it will consider any income stream assigned by court order to be irrevocable to comply with the income assignment rules.

Although we have understood this to be true, new policy specifically states that if a d4A or a d4C SNT buys a home or a vehicle, the asset must be titled in the beneficiary's name, unless state law prohibits such. A vehicle may need to be titled in a different driver's name, but a lien should be placed on the vehicle. It is in this section the SSA recognizes that others may benefit from the home or the car without contributing, but there would be limits.

The biggest change/clarification came with relaxed language for d4A and d4C, moving from "sole benefit" to "primary benefit" for the distribution standard. Although still calling the d4A and the d4C SNTs sole benefit trusts, "the Administration elaborated to say the trust must be for the 'primary benefit' of the beneficiary" and that others may also benefit from the use of the SNT funds.

A few years back, there was concern that SSA would require caregivers being paid from a SNT to be specially licensed or even unrelated to the beneficiary. Now the policy manual specifically contemplates paying family caregivers and says that no medical training or certification is required.

Travel expenses are always an issue and fall into two categories; paying for others to come to visit the beneficiary and paying for the travel of the beneficiary and those accompanying the beneficiary. Third-party travel to accompany a beneficiary has been clarified to include transportation, food, and lodging. Use a "reasonableness" test to determine how many accompanying individuals can be paid or reimbursed. As for visitation, the policy remains that the travel must be to ensure the well-being of the SNT beneficiary in a facility.

We now have specific policy that ABLE accounts can be funded from a SNT. There was an additional update to the ABLE POMS that will be discussed in another article, but ABLE accounts are becoming more useful and should be considered for any SNT beneficiary who can qualify for one.

This is only a sampling of the changes that occurred. These and other changes will be discussed more in depth at a full-day CLE program on special needs trusts scheduled for Mar. 22, 2019, in Tampa. Members of the Special Needs Trust Committee are working on several additional articles about these SNT POMS changes, the new ABLE POMS, and the new trust decanting law.

Travis D. Finchum *is a Florida Bar board certified elder law attorney and is the founder of Special Needs Lawyers PA. He co-chairs the Special Needs Trust Committee and is a past chair of the Elder Law Board Certification Committee. He founded the Guardian Trust Foundation, Inc., that serves as trustee of various pooled and individual special needs trusts. His practice in Clearwater, Florida, consists of special needs trust drafting and administration, public benefits, estate planning, and probate.*

The end of Medicaid retroactive eligibility?
An update

by Heidi M. Brown

Last summer I wrote about the possibility of retroactive coverage for Medicaid ending. The Florida Agency for Health Care Administration (AHCA) had filed a waiver amendment request with the U.S. Centers for Medicare and Medicaid Services (CMS) requesting the end of retroactive eligibility and thus retroactive coverage for non-pregnant adult Medicaid applicants.[1] CMS has approved AHCA's request, and Medicaid applications submitted Feb. 1, 2019, and later will no longer be granted retroactive eligibility and Medicaid coverage.[2] Eligibility will start as of the first of the month of application.

Following is a summary of what has happened so far. Currently, a Medicaid applicant can request and be granted retroactive Medicaid eligibility and coverage for up to three months prior to the month of application. Therefore, if an applicant applies in April, he or she can receive Medicaid eligibility and coverage from January forward, if he or she would have been eligible in those previous months. This past spring, the Florida Legislature passed the 2018-19 Florida budget, which mandated that AHCA apply for federal approval to "eliminat[e] the Medicaid retroactive eligibility period for non-pregnant adults."[3] Originally, the effective date was for applications filed on or after July 1, 2018. In March 2018, AHCA prepared an amendment to the current managed medical assistance (MMA) waiver plan that requested, *inter alia,* the elimination of the Medicaid retroactive coverage.[4] Following a public hearing and comment period, AHCA submitted the waiver amendment to CMS for approval. The Elder Law Section, along with other concerned stakeholders, submitted comments to both AHCA and CMS.

On Nov. 30, 2018, CMS approved the amendments to the MMA waiver plan. There is some confusion about the effective date of the termination of retroactivitity. For example, the first page of the cover letter from CMS states that the changes are effective Dec. 1, 2018;[5] however, the actual approval document states that termination of retroactive eligibility is "effective February 1, 2018 [sic]."[6] AHCA issued a Florida Medicaid Health Care Alert that stated the changes are effective Feb. 1, 2019.[7] AHCA has legislative authority for the elimination of retroactive eligibility until June 30, 2019. If the Florida Legislature and/or AHCA want to continue this waiver of retroactive coverage, the Florida Legislature must reauthorize it and AHCA must submit a letter to CMS by May 17, 2019, requesting its continuation.[8] If the state fails to do so, the waiver regarding the termination of retroactive eligibility will end, and retroactive coverage would then become available if requested by the applicant.

According to the cover letter accompanying the approval from CMS to AHCA, the state must "test whether this policy [of eliminating retroactive eligibility] encourages Medicaid beneficiaries to obtain and maintain health coverage, even when healthy, or to obtain health coverage as soon as possible after becoming eligible."[9] CMS used as an example that the state must evaluate whether the

continued on page 16

SECTION SCENE

Elder Law Section Annual Retreat

The entire group poses for a photo prior to the photo scavenger hunt in Washington, D.C. Included are ELS members Victoria Heuler, Randy Bryan, Shannon Miller, David Hook, Joan Nelson Hook, William Johnson, Jason Waddell, Amy Waddell, Jill Ginsberg, Collett Small, and Kara Evans.

See how quickly attendees turn once they are told this will be a competition against one another!

And the winner is … The DC Panhandlers!

Pictured here are ELS Chair Jason A. Waddell, his wife and ELS member Amy Waddell and their son, ELS Chair-Elect Randy Bryan with his two daughters, and Leslie Reithmiller, program administrator for the ELS. All with ties to the Florida Panhandle, The DC Panhandlers takes a team photo with the U.S. Capitol in the background to earn points as part of the scavenger hunt.

Victoria Heuler, her husband and two daughters, and William Johnson and his daughter made up The Wheels. Here they are checking off getting a picture with the Washington Monument to earn points in the scavenger hunt.

Erica Wood, assistant director of the ABA Commission on Law and Aging, provides an update on several Uniform Acts trending across the United States.

David M. Goldfarb, senior public policy manager with the National Academy of Elder Law Attorneys, provides insights into several pending matters on Capitol Hill.

Team Homeys: Shannon Miller, Kara Evans and her husband, Mary Trotter, and Stephanie Villavicencio and her husband

Team Hook: Joan Nelson Hook, Jill Ginsberg, Collett Small's daughter, Collett Small, David Hook and his wife, and Denise Lettau

Team Hook, The Wheels, and Team Homeys members Shannon Miller and Kara Evans celebrate at the end of the hunt.

Many thanks to our Section Sponsors and Friends of the Section. We were able to add many fun events to the program due to their support.

Attendees enjoy a nighttime walking tour of the national monuments on their last night in D.C.

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The Elder Law Section thanks ElderCounsel for sending membership recruiter Jim Wolverton to speak to our attendees on how to develop a positive team environment both within the office and within our section.

elimination of retroactivity encourages applicants who need long-term services and supports (LTSS) to "apply for Medicaid expeditiously."[10] The state is also ordered to test whether the changes are designed to "facilitate receipt of preventative care" and to "reduce Medicaid costs."[11] The state also is mandated to evaluate the financial impacts of the elimination of retroactive coverage. Another requirement that CMS mandated is that the state must increase awareness of the amendment and provide outreach and education to current beneficiaries and medical providers, such as nursing facilities. According to CMS, the outreach will "help ensure that eligible individuals apply for and receive Medicaid coverage in a timely manner" and will help medical providers "understand how to assist individuals in gaining coverage."[12]

The effects of these changes could prove to be significant to our clients. It can take a month or longer for a Medicaid applicant to gather all the necessary documentation to evaluate whether he or she would be eligible. Sometimes the applicant is not physically or mentally capable of compiling the information and there is no fiduciary appointed to help. Sometimes in the case of a serious accident or acute illness, the applicant and the family may only be focusing on surviving and not applying for benefits. Nursing homes and hospital care can be very expensive. The state has estimated that this change would affect about 39,000 Floridians annually and save about $98 million for the state in Medicaid spending.[13] It will be incumbent upon us to educate our clients and local Medicaid providers of the need to assemble the necessary information for the application more quickly and to complete the required steps for achieving Medicaid eligibility.

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

Endnotes

1 *See* Heidi M. Brown, The end of Medicaid retroactive eligibility?, The Elder Law Advoc., Vol. XXV, No.2, pg. 11 (summer 2018) *available at* http://www.eldersection.org/wp-content/uploads/2018/09/Eldr-2018-Summer_XXV_No.2-web.pdf.

2 *See* U.S. Dept. of Health & Human Servs. (HHS), Ctrs. for Medicare & Medicaid Servs. (CMS), Approval of MMA 1115 Waiver of Retroactive Coverage (Nov. 30, 2019) available at https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/fl/fl-mma-ca.pdf.

3 H.B. 5001, 2018-9, Reg. Sess. (Fla. 2018).

4 *See* FL Agency for Health Care Administration (AHCA), 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.

5 HHS, CMS, *supra* note 2, page 1 of accompanying Letter from Seema Verma, Administrator, CMS to Justin Senior, Secretary, AHCA (Nov. 30, 2019), available at https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/fl/fl-mma-ca.pdf.

6 HHS, CMS, *supra* note 2, page 2 of 73, available at https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/fl/fl-mma-ca.pdf. This assumes there is a typographical error and CMS meant to write February 1, 2019, instead of February 1, 2018.

7 FL Agency for Health Care Administration, Florida Medicaid Health Care Alert: Changes in Medicaid Retroactive Eligibility (Dec. 7, 2018).

8 HHS, CMS, supra note 2.

9 *Id*., page 2 of accompanying Letter from Seema Verma, Administrator, CMS to Justin Senior, Secretary, AHCA (Nov. 30, 2019).

10 *Id.*

11 *Id.*

12 *Id*. At page 3 of accompanying letter.

13 Elizabeth Koh, *Feds let Florida trim retroactive Medicaid Eligibility,* Miami Herald, Dec. 3, 2018, available at https://www.miamiherald.com/news/health-care/article222558105.html.

Whose decision is it anyway?

Submitted by David Hook and Collett P. Small on behalf of the Guardianship Committee

As elder law attorneys, we are constantly faced with questions regarding our client's capacity to make decisions: be it in executing estate planning documents or advance directives, or petitioning for guardianship. The legislative intent of the Florida Guardianship Statute is to "… make available the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs and that alternatives to guardianship and less restrictive means of assistance, including, but not limited to, guardian advocates, be explored before a plenary guardian is appointed."[1]

In parallel with this legislative intent, we, as elder law attorneys, strive to make sure our clients have the advance directives in place so the assistance our clients may need in the future is there when they need it. Most people we know, whether they be friends, clients, or colleagues, see themselves as independent, autonomous people. We often hear clients say they don't want anyone making decisions for them and they can make decisions by themselves. But does anyone really make (important) decisions purely autonomously? For example, when you last purchased a car, did you ask a friend or neighbor for his or her opinion? Did you look up reviews online? You may have even been guided by the salesperson in deciding which options were the most important to you. This is an example of "supported decision making." You knew what you wanted, but you turned to those you trusted to help you with your decision. In this kind of supported decision making, the responsibility for the decision is clear: your decision, your responsibility. You probably would not go back and blame your friend or neighbor for your action of buying a car you end up not liking. You might try blaming the salesperson for selling you more than you wanted. But, in the end, you know it was your choice and your responsibility; you get to pay for it.

This element of responsibility is critical as we think about other forms of "supported decision making" and "substituted decision making." Florida Statute 744.358(1) states: A guardian is not liable, solely because of the guardianship, for the debts, contracts, or torts *of her or his ward*.[2] Of course, the guardian is liable if *he or she* "waste[s], embezzle[s] or intentionally mismanage[s] the assets of the ward."[3] The world of guardianship is clear when it comes to this question of responsibility.

The question of responsibility is a little foggier in less formal relationships. The question arises: did the decision maker get assistance with the decision or was he or she influenced in his or her decision? Most of us have seen or heard of situations where a family member utilizing a power of attorney moves money from one account to another (which benefits the agent in fact or AIF) and the AIF's first defense is "Mom asked me to do that." In other words, "I'm not responsible; I was only doing what she wanted." Sometimes these situations are clearly exploitation. But sometimes it can be a question of whether this was an example of "supported decision making" gone bad. If there was undue influence, then there can be "responsibility" placed on the influencer.

But what about situations where someone is simply helping to facilitate a person in the exercise of a decision, good or bad; is there any inferred responsibility? We propose that we need to ask this question of responsibility as we think about the issue of supported decision making. It appears that we will be seeing proposed legislation in the coming years addressing supported decision making. As we review this legislation, we would suggest that we ask the question "who is responsible, and to what extent?" for the decisions being made for, or with, the person.

David Hook *is a board certified elder law attorney practicing in New Port Richey, Florida, and is past chair of the Elder Law Section.*

Collett P. Small *is a partner in the law firm of Slater & Small PLLC with offices in Coral Springs and Pembroke Pines, Florida. She is the immediate past chair of the Elder Law Section. She currently serves on The Florida Bar Diversity and Inclusion Standing Committee. She is on the board of directors for the Weston Bar Association. Ms. Small is board certified by The Florida Bar as a specialist in elder law.*

Endnotes

1 F.S. § 744.1012(2).
2 F.S. § 744.358 (1) 2018 (emphasis added).
3 F.S. § 744.359 (2) (c) 2018.

In memoriam:
Remembering Arlene Hechter Lakin

by Heather Boyer Samuels, Co-Editor, *The Elder Law Advocate*

Collett Small, Arlene Lakin, and Jill Ginsberg

Arlene Hechter Lakin, board certified elder law attorney, veterans affairs accredited attorney, and longtime member and supporter of the Elder Law Section, passed away suddenly on Dec. 6, 2018. A fervent advocate for disabled individuals in Florida, Arlene founded Florida's Voice on Developmental Disabilities (FVDD) in honor of her son, Douglas, and served as president. Founded in 1995, FVDD is an organization composed of "a group of dedicated individuals, families, agencies, and professionals who strive to be a voice and an advocate to make a difference in the lives of persons with developmental disabilities." Arlene practiced as an elder and special needs attorney in Margate and Pompano Beach and served as co-chair of the Broward County Bar Association's Elder and Special Needs Law Section. She was beloved by her clients and peers.

Arlene never shied away from a challenge or an opportunity to help, teach, or mentor. Her organizational skills, wide breadth of knowledge, and personal experiences in advocacy made her an outstanding lawyer, and her consistent willingness to help and to share her expertise made her the best kind of colleague. Many of our members can recall consulting with Arlene on client matters, presentations, and policy issues. Kind, witty, and generous of spirit, Arlene often could be found going out of her way to mentor a colleague, to share her materials, or to help develop a new idea.

Arlene's elder law practice became her life when her husband, a trauma surgeon, began suffering from Lewy body dementia. She supervised his care for six years, until he passed away in 2016, living through the experiences about which we elder law attorneys counsel our clients. Always willing to share her experiences with others, Arlene spoke frequently about navigating the system on behalf of her family, and she was honored locally and statewide for her profound efforts with regard to her tireless work on behalf of the elderly and disabled.

Arlene's passing leaves our elder law community without one of its strongest advocates—and we mourn her passing with great sadness. We hold her beautiful family in our thoughts. To honor Arlene's memory, her family has identified the Ann Storck Center as the place to consider a donation (*annstorckcenter.org*).

PRACTICE MANAGEMENT

Will your employment practices get you sued?

by Audrey J. Ehrhardt

Business owners are far more likely to be sued by their employees than their customers. This is true for lawyers as well! Last year alone, 84,254 employment practice charges were filed with the federal Equal Employment Opportunity Commission.[1]

The costs of these lawsuits are potentially devastating, especially to a small to midsize law firm. What many business owners do not realize is that attorney fees can run into the thousands of dollars just for responding to complaints.

Despite the serious nature of many cases, there is plenty of evidence to suggest that employers are being sued even when they are trying to follow the law and make the best decisions for their businesses.

The good news is that there are plenty of things employers can do to avoid or resolve issues before they become lawsuits—the top areas being harassment, discrimination, unlawful termination, and violations of the Americans with Disabilities Act.

First, educate your employees and managers. Everyone has the right to work in a safe environment that is free from harassment and discrimination. Craft a policy with your employment lawyer designed to achieve this, and make it clear that inappropriate behavior will not be tolerated. Do not skimp on having it reviewed by your employment attorney. Just as you would tell your clients they need to work with an expert in the field, so do you.

Make sure your employees know they can speak to you, or if you are a larger firm a supervisor, without retaliation. Make sure you are prepared for how concerns will be addressed. Make sure your supervisors and your team members know they have a responsibility to report inappropriate behavior once they become aware it, whether or not someone makes a complaint.

Put this in writing and issue regular reminders. Hold training sessions. Don't let it be ignored.

According to the research from XcelHR, roughly "60% of employers have faced an employee lawsuit in the previous five years, 67% of which resulted in a judgment for the plaintiff when taken to litigation."[2] A great way to avoid these lawsuits is to issue some level of severance upon termination. It can be as simple as letting a fired employee keep a laptop or stay on your company's health care for a few months. In any case, it's recommended to have the employee sign a legal release in exchange for any severance.

If you as a business owner aren't doing these simple things, you may be at risk. All the amazing work you have done in your firm and your local community may be at risk. Contacting an employment attorney, and putting one on retainer, may be a good first step to protecting you and your business against expensive—and preventable—lawsuits.

***Audrey J. Ehrhardt, Esq., CBC**, builds successful law firms and corporations across the country. A former Florida elder law attorney, she is the founder of Practice42, llc, a strategic development firm for attorneys. She focuses her time creating solutions in the four major areas of practice development: business strategy, marketing today, building team, and the administrative ecosystem. Join the conversation at **practice42.com**.*

Endnotes

1 U.S. Equal Employment Opportunity Commission, Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2017 (2018), available at https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

2 Average Settlement for Wrongful Termination Cases, available at https://www.coverwallet.com/general/average-settlement-wrongful-termination.

Tips & Tales

by Kara Evans

Uncooperative parties
Custodians and personal representatives for last will and testament

The tale: Saul, a business owner, calls you with a complaint. A client of his passed away owing him money. Saul knows there is money somewhere, and he wants to file a claim in the estate. The problem is that no one has filed a petition for administration, and no will has been deposited with the clerk of court. Saul was friendly with Phil, the decedent. Phil had a daughter, and Saul is pretty sure Phil had a last will and testament. What should he do?

The tip: Saul thinks it is very likely that Phil's daughter is in possession of the last will and testament. You, as the attorney, already know that F.S. 732.901(1) requires the custodian of a will to deposit that will within 10 days of learning that the testator has died. But most regular humans have no knowledge of this requirement and when advised that they must deposit the will, they typically comply. After Saul's polite request of the daughter, however, no will was produced. Fortunately, the statute provides a way to compel the custodian of the will to produce the document and even provides for costs, damages, and attorney's fees if the court finds that the custodian had no reasonable cause for failing to deposit. Following F.S. 732.901(2), you create a petition for production of will and an order requiring production of will. Before you file the petition, you send a certified letter to the daughter citing the statute and requesting she deposit the will within 10 days of receiving the letter. You explain the consequences of noncompliance and include a copy of the petition. Sure enough, the daughter deposits the will.

But she does not file a petition for administration. There is no provision in the statutes to compel anyone to file the petition for administration. But there is more than one way to skin a cat. F.S. 733.202 states that "any interested person may petition for administration." Is Saul, as a creditor, an interested person? You bet he is! You create a petition for administration for Saul. The last will and testament states that the daughter is nominated to act as personal representative. You already know she has no interest in probating Phil's estate. If the petition requests she be nominated, can you or Saul make her file her oath and accept the position? The answer to that is no; however, you can file the petition and request that Saul be appointed. The trick here is found in Probate Rule 5.201(b). Before Saul can be appointed, formal notice must be served on all persons entitled to preference equal to or greater than the applicant. Don't forget to attach a copy of the will to the notice.

Preference in appointment can be found in F.S. 733.301. First is the person appointed by the will, second is the person selected by a majority in interest of the persons entitled to the estate, and third is any devisee under the will. Saul is none of these; however, he did properly notice all of the individuals fitting the description. If no one objects, he can be appointed. Usually at this point in the process, the person appointed as the personal representative in the will exerts his or her right to priority and requests that letters of administration be issued. Saul can now file his claim against the estate.

The custodian of the last will and testament and the personal representative are not the only parties whose cooperation is essential to the probate process. Next time, we will discuss uncooperative beneficiaries.

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

TAX TIPS

by Michael A. Lampert

Where is my income tax refund?

Around this time of year, people begin to clamor for their income tax refund. It is not uncommon for an elder client, both during lifetime and after death, to be due an income tax refund. While some clients regularly have a refund due to too much withholding or estimated tax payments, others typically do not have a refund, but due to the current year's circumstances, they do. Some reasons for receiving a refund include having made estimated payments based on pension income that stopped due to death, larger than normal medical expenses resulting in less tax due, and application of various refundable credits, to name a few. In addition, the so-called Tax Cuts and Jobs Act increased and decreased various credits and deductions, and may increase (or decrease) a client's income tax refund.

Reminder: Remember that the Tax Cuts and Jobs Act caused many clients' withholding to be reduced, increased standard deductions, suspended personal exemptions, increased the child tax credit, added a new credit for other dependents, and limited or discontinued certain other deductions.

Practice tip: The IRS website has a withholding calculator to perform a check to see if withholding should be adjusted or if additional estimated or other tax payments should be made.

What sometimes happens is that the income tax refund is late in coming or is never received. For many clients, this is simply a nuisance. In some cases, however, the client's receipt of the income tax refund is desperately needed to avoid eviction or utility shutoffs. This article will provide a practical overview of "Where is my (client's) tax refund," with some practical tips.

Last known address

Refund checks are mailed to your client's last known address. If the Postal Service did not forward the check and if the IRS is not notified of the change of address, the refund check may be returned to the IRS.

Practice tip: IRS Form 8822 notifies the IRS of a new address. While a subsequently filed income tax return also notifies the IRS of the address change (if it has the new address), the later year's return is usually too late for the IRS to correctly mail the prior year's income tax refund. It is also not uncommon for a tax preparer to not update the client's address on the income tax return.

If your client was expecting an income tax refund and did not receive it, now what?

Most refunds are issued within 21 calendar days; however, various factors can delay refunds. Some reasons include incomplete returns, errors in the returns, identity theft or fraud indicators, and being selected for further review. In addition, if the Earned Income Tax Credit (EITC) or Additional Child Tax Credit (ACTC) is on the return, refunds will not be issued until at least mid-February. This procedure is in place to reduce tax fraud.

But the client is anxious; can we just call the IRS?

The short answer is yes; however, generally you must wait at least 21 days after a tax return is filed electronically and six weeks if the tax return was mailed. The IRS website has a "Where's My Refund?" section. You (your client) will need to enter the Social Security number, filing status, and the exact whole dollar amount of the expected refund. If there is an address change, you may be prompted to change the address online. Interestingly, you can check on the status of a refund for an electronically filed return 24 hours after filing, and after four weeks if filed by mail.

Practice tip: A refund is generally issued faster as a result of an e-filed return compared to a paper filed return.

Practice tip: There is often a long wait while on hold to speak with a phone representative. The online system can generally provide the refund information faster.

Practice tip: Calling does not speed up the refund process.

Practice tip: If calling the IRS or otherwise taking action for a client when the client is not physically present, obtain Form 2848 (Power of Attorney and Declaration of Representative) or Form 8821 (Taxpayer Information Authorization). Form 8821 authorizes the party designated to "inspect and/or review confidential information" from the IRS regarding the type of tax and the years or periods listed on the form. Form 2848 not only authorizes receipt of confidential information, but it also authorizes representation before the IRS.

Practice tip: When obtaining information from the IRS on behalf of the client (or for any filing with the IRS), obtain a copy of the client's government-issued photo ID. It is important that you know your client really is who he or she claims to be, especially because you are representing that you are authorized by that client to deal in some capacity with the IRS. Do not inadvertently assist in identity theft fraud.

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Income tax refund

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Why did direct deposit of the refund into the client's bank account not happen?

There could be multiple reasons. Sometimes the financial institution rejects the direct deposit. Sometimes the information given to the IRS for the direct deposit is wrong. In an effort to reduce identity theft and other types of fraud, the IRS will not deposit more than three electronic refunds into a single financial account. In addition, electronic deposits can only go into an account in the taxpayer's name, the taxpayer's spouse's name, or into their joint account.

Why might the refund amount differ from the amount shown on the income tax return?

It is not uncommon for the client to have refund offsets for debts such as federal income tax, state income tax, child support, student loans, etc. If that happens, follow up with the agency that caused the offset. Sometimes the IRS corrects clerical errors that can change the refund amount. Of course, if you believe the IRS is incorrect, this should be addressed.

What about refunds from amended income tax returns?

The IRS website has a section "Where's My Amended Return?" Remember that amended returns are also subject to review and even audit.

Unfiled returns

The author sometimes has clients whose income is below the income tax return filing requirement threshold. When looking at their paperwork, however, withholding or other payments are shown as being made by or on behalf of the client. In some cases, the client may be entitled to the Earned Income Tax or other credit where the client may even be refunded more than was paid in. In these cases, an income tax return needs to be filed, or after two years, the refund may be lost. The same applies to non-U.S. citizens who have had tax withholding of income. To claim a refund, an income tax return must be filed.

Practice tip: Some clients who are non-U.S. persons have an Individual Taxpayer Identification Number (ITIN) rather than a Social Security number. Any ITIN not used on a federal (not state) tax return in the past three tax years expired on Dec. 31, 2018. ITINs with middle digits of 73, 74, 75, 76, 77, 81, or 82 also expired at the end of 2018. To renew, a Form W-7 will need to be filed. It can typically take seven weeks to receive an ITIN, longer during the heart of tax filing season.

What if the client is truly financially desperate for the refund?

Sometimes the client is in imminent danger of significant harm without receipt of the refund. Examples include final utility shutoff notices, eviction notices, and the like. If this is the case, organize the information such as a copy of the income tax return, proof of return filing, efforts (if any) to obtain the refund, and backup regarding the significant actual or imminent harm.

Your client, or you with a Form 2848 IRS Power of Attorney, may contact the Taxpayer Advocate's Service. The local offices are listed on the IRS website. The Taxpayer Advocate Service has specifically stated that these types of cases should be brought to them so they can try to expedite an otherwise delayed refund.

Practice tip: The Taxpayer Advocate Service generally makes "first contact" very quickly after a request for assistance is made. Be ready.

Practice tip: In a non-emergency situation, if the refund has been delayed beyond the time periods listed above, plus an additional 30 days, a request for Taxpayer Advocate Service assistance can also be made.

Practice tip: The Taxpayer Advocate Service is overworked and understaffed. They truly want to help, but absent an emergency, *please* use normal IRS resolution channels first.

Deducting business meals

What is commonly referred to as the Tax Cuts and Jobs Act (TCJA) changed the law by disallowing deductions for entertainment, amusement, or recreation expenses. This left many wondering "what about business meals?"

While there are no regulations yet, the IRS recently issued Notice 2018-76 to address the issue. The notice provides that taxpayers generally may still deduct 50% of the expenditure for food and beverages associated with their trade or business. More specifically:

1. the expenses should be ordinary and necessary under IRC Sec. 162;
2. the expenses cannot be lavish or extravagant;
3. the taxpayer, or an employee of the taxpayer, is present when food or beverages are provided;
4. food or beverages are provided to a current or potential business customer, client, consultant, or similar business contact; and
5. food or beverages are purchased separately from entertainment (or stated separately on one or more bills, invoices, or receipts).

Practice tip: The substantiation requirements have not changed. Keep adequate receipts and, ideally, contemporaneous lists showing who the meal was with and the purpose. Remember that it is still necessary to have adequate backup to support the income tax deduction.

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

Fair Hearings Reported

by Diana Coen Zolner

***Petitioner v. Florida Dept. of Children and Families,* Appeal No, 18F-07598 (Filed Apr. 18, 2018)**

The petitioner appealed denial of her request for Medicaid for herself, a 65-year-old individual. On the application, the petitioner answered no to the question "U.S. Citizen." She also reported a monthly salary of $500 and expenses for medicine, telephone, and other household expenses. Since the petitioner answered no to the U.S. citizenship question, the department had to verify her immigration status using the Systematic Alien Verification for Entitlements (SAVE) through the U.S. Citizenship and Immigration Services (USCIS) with the Department of Homeland Security (DHS). The system's response was: "lawful permanent resident - employment authorized ... admitted for an indefinite stay."

Based on the timing of the petitioner's immigration status, the respondent determined that the petitioner would not qualify for any of the department's programs, except Emergency Medicaid for Aliens (EMA). The respondent's notice of case action (NOCA) denying the petitioner's Medicaid application stated, "your Medicaid application/review dated October 4, 2017, is denied for the following months: October 2017, November 2017. Reason: you or a member of your household does not meet the disability requirement; there are no eligible children that live in your home; no household members are eligible for this program." The respondent stated that even though the NOCA stated that the petitioner was not disabled, that was not a factor in its determination since the petitioner was already 65, and therefore qualified based on her age. A decision of disability by the Division of Disability Determination (DDD) was neither required nor requested.

Meeting the citizenship/qualified immigration status is a technical requirement to qualify for Medicaid, and the petitioner did not meet this criterion. At the hearing, the respondent presented the department's policy indicating technical requirements for noncitizens. Its Program Policy Manual, passage 1440.0106, indicates which immigrants are eligible for public benefits programs: "a Lawful Permanent Resident (LPR) client would only be eligible if he/she had (1) entered [the U.S.] prior to 8/22/96 and remained continuously present, (2) on or after 8/22/96 under a prior asylee, refugee, Ameraisan, deportation withheld, or Cuban/Haitian Entrant status, or (3) on or after 8/22/96 and have lived in the U.S. as a qualified non-citizen for at least five years." The respondent determined that the applicant entered the United States after Aug. 22, 1996, and was therefore subject to a ban from eligibility for five years from the date of entry, and that the five-year ban had not yet elapsed.

During the hearing, the petitioner stated that since the time she had applied for benefits, she was no longer employed and had no income. She suffered from many ailments and could not afford private medical insurance or the cost to private pay for medical care. The petitioner further stated that she was aware of EMA; however, that program did not meet her recurring medical needs. The petitioner further stated that she had entered the United States on a visitor's visa and returned to her home country after six months, and then repeated this process several times. As a result, she argued that she had received her qualified immigration status as an LPR more than five years ago. The respondent stated that the five-year ban started when the petitioner acquired LPR status, or the actual date of entry with an immigration status. The respondent argued that, in the petitioner's case, her LPR status had started less than five years ago because she initially entered the United States as a visitor and the period of time she remained in the United States in visitor status did not count toward the five-year ban.

The Code of Federal Regulations at 7 C.F.R. § 273.4, Citizenship and Alien Status, explains who meets the requirement to be a U.S. citizen or a qualified alien eligible to receive benefits from the department. The respondent must follow these federal guidelines when determining the petitioner's eligibility for Medicaid. United States Code 8 U.S.C. § 1613 addresses the five-year limited eligibility of qualified aliens for federal means-tested public benefits and stipulates that qualified aliens who entered the United States on or after Aug. 2, 1996, are not eligible for any federal means-tested public benefits for a period of five years, beginning with the date the qualified alien status is established. The federal regulations set forth several exceptions to the five-year ban. The respondent determined that the petitioner did not meet any of the exceptions; therefore, she was subject to the five-year ban and was not eligible for Medicaid benefits based on the date she acquired qualified alien status.

The Program Policy Manual at passage 1440.0106 and Florida Administrative Code R. 65A-1.715, Emergency Medical Services for Aliens, both state that noncitizens who would otherwise be eligible for Medicaid except for their noncitizen status are eligible for emergency medical services and can apply for Emergency Medical Assistance for Aliens at any time. The hearing officer considered the petitioner's arguments, but found that there was nothing in the regulations that would provide a better outcome for the petitioner. As a result, the hearing officer found that the respondent's action to deny the petitioner's Medicaid application due to the petitioner not meeting an eligible immigration status was correct and within the rules.

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Fair Hearings Reported

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***Petitioner v. Respondent,* Appeal No, 17N-00100 (Filed Apr. 18, 2018)**

The petitioner entered a nursing home facility in September 2017 and remained a resident there until October 2017, when he required hospitalization. The petitioner had Medicare Part A and Medicaid as a secondary payor. At the time of his admission to the nursing facility, he was placed in a dual certified bed. Two days after the petitioner went into the hospital, the respondent claimed that the petitioner had notified the hospital's case manager that he did not wish to return to the facility. Two days later, the hospital's case manager indicated to the facility's admissions director that the petitioner had changed his mind and wished to return to the facility. At that time, the admissions director informed the case manager that the facility did not have an "open male dual certified bed" available for the petitioner. After a 12-day stay in the hospital, the petitioner was placed in a different facility, but wished to return to the facility he was in before his hospitalization. The petitioner explained that he had been informed by the facility that he would be able to return when he was discharged from the hospital. Furthermore, the petitioner stated that the facility also had informed him that even though he was discharged to another facility, he could still return to the respondent facility when a bed became available.

The respondent facility's registered nurse and physician determined that the petitioner required hospitalization and had him transported to the hospital due to illness. The facility did not provide the petitioner with a written notice of its bed-hold policy. The respondent argued that since Medicare was paying for the petitioner's stay at the facility when he was hospitalized, the facility did not have to follow the bed-hold policy. The respondent further argued that the bed-hold policy would have applied to the petitioner only if Medicaid was paying for his stay or if he was private paying for his stay at the facility.

The Code of Federal Regulations 42 C.F.R. § 483.15 limits the reasons for which a Medicaid or Medicare certified nursing facility may discharge a patient, and states in pertinent part: "(1) before a nursing facility transfers a resident to a hospital or the resident goes on therapeutic leave, the nursing facility must provide written information to the resident or resident representative that specifies the duration of the state bed-hold policy, if any, during which the resident can return and resume residency at the facility; (2) the reserve bed payment policy, and (3) the nursing facility's policies regarding bed-hold periods." The Federal Code also indicates that the facility must establish and follow a written policy permitting residents to return to the facility after they are hospitalized or placed on therapeutic leave and that a resident must be provided with the bed-hold policy upon transfer. Additionally, Florida Statutes § 400.0255 addresses appeal rights when a transfer or discharge occurs. The Florida statute states in pertinent part: "when a discharge or transfer is initiated by the nursing home, the nursing home administrator must sign the notice of discharge or transfer ... and if the decision on appeal is favorable to the resident who was transferred or discharged, the facility must readmit the resident to the facility's first available bed."

The hearing officer determined that the above controlling authorities require a higher standard of proof in nursing home discharge hearings in that there "must be substantial and credible evidence at the level of clear and convincing" that the facility provided proper notification of its bed-hold policy. In this case, the hearing officer concluded that the petitioner's evidence was more credible and that the respondent's evidence did *not* indicate clear and convincing evidence that the facility had provided the petitioner with its bed-hold policy. As a result, the appeal was granted, and the nursing facility must readmit the petitioner to the facility when a bed becomes available.

***Petitioner v. Florida Dept. of Children and Families,* Appeal Nos., 17F-00680 and 17F-00755 (Filed Mar. 20, 2018)**

The petitioner's representative applied for Institutional Care Program (ICP) Medicaid in August 2016 and reported the petitioner's income as Social Security income in the

amount of $582 and a civil service annuity from the Office of Personnel Management (OPM) in the amount of $2,663, for a total gross income of $3,245. At the time of the department's decision, the income limit for an individual under the ICP Medicaid program was $2,199. The department determined that the petitioner's income exceeded the income limit and required $1,046 to be deposited into a qualified income trust (QIT) in order to meet the income limit. The department further determined that the months of August and September 2016 were not approved because the QIT was not properly funded. The respondent contended that $1,000 was deposited for the month of August, when $1,046 was required, and $0.00 was deposited for the month of September.

The petitioner did not dispute that the QIT was not properly funded for the months of August and September; however, the petitioner's representatives sought a hardship for not properly funding the QIT for those months. The petitioner's representative argued that the petitioner's spouse had limited means and now that she was living alone, paying the facility the funds the petitioner owed for August and September would drain her assets and create a financial hardship. The respondent concluded that "[u]nderfunding an income trust would not be grounds of a hardship case [because] the client receives medical care, food, shelter and other necessities of life by the nursing facility."

The department's Program Policy Manual, 165-22, at Appendix A-22.1, Guidelines for Reviewing Income Trusts, explains that to be eligible for the ICP Medicaid program, an individual may not have gross income that exceeds 300% of the federal benefit rate after allowable deductions. Individuals whose income exceeds the income limit may qualify for ICP Medicaid by funding a QIT account that meets the criteria. For the ICP program, the department determines if an individual's income qualifies him or her for the program by including his or her total gross income, excluding income placed in the QIT account, for the month in which the income is received. The total gross income must be less than the ICP income standard for the individual to be eligible for each month. If an individual's gross income exceeds the ICP income standard, the individual or the legally authorized representative must deposit sufficient income into the trust account in the month received to reduce the countable income to within the program's income standard. The deposit must be made for each month that ICP coverage is requested.

According to the above controlling authorities, the petitioner's monthly income outside of the QIT was countable income and was compared to the limit of $2,199. The petitioner's income outside of the QIT exceeded the ICP income limit for August and September 2016. Although the petitioner argued that it would be a hardship to the petitioner's spouse to pay the facility what was owed, the hearing officer found no legal authority that would allow for a hardship to be granted in situations of an improperly funded QIT. The petitioner's representative was given the opportunity to supply memorandums of law to support his position that a hardship should be granted, but none were provided. Therefore, the hearing officer concluded that the petitioner did not meet his burden to show that the department had incorrectly denied his request for a hardship to be granted for the months of August and September 2016 and that the department's action to deny ICP eligibility for those months was correct.

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

Summary of selected case law

by Diane Zuckerman

Necessary elements for injunctive relief

Ronald N. Dubner, Appellant, v. Frank Ferraro, Appellee, Case No. 4D17-1435 (4th DCA, 2018)

Issue: Did the movant for injunctive relief prove the necessary elements under Florida Rule of Civil Procedure 1.610?

Answer: No

This case arose in the course of three lawsuits brought by Ronald Dubner, a beneficiary of an estate, against his step-siblings for tortious interference, undue influence, and unjust enrichment, among other theories. Essentially, Dubner sought to recoup approximately $100 million from his two step-siblings.

The facts revealed that Dubner had demanded the third-party financial institution to place a freeze on the account holding the assets of the estate. The financial institution complied with the demand.

Consequently, the step-siblings filed an emergency motion for injunctive relief requesting that the court invalidate the freeze of assets. They argued that the financial institution's unilateral freeze on the account was tantamount to a prejudgment writ, was without notice, was causing irreparable harm, and was preventing them from accessing critical funds. In response to the motion, the trial court ordered the third-party financial institution to remove the freeze on the account, and the appeal ensued.

As a starting point, the appellate court indicated that injunctive relief is governed by Florida Rule of Civil Procedure 1.610. In relevant part it provides that when an injunctive order is issued, it must specify the reason for entry, describe in detail the actions that are restrained, and indicate that the injunctive relief is binding on parties who receive actual notice of the injunction. The court cited to several cases where trial courts were found to have erred by not addressing these specific elements in an order for injunctive relief.

A movant for temporary injunctive relief must demonstrate four elements: 1) irreparable harm will result, absent relief; 2) an adequate remedy at law is unavailable; 3) a substantial likelihood of winning on the merits exists; and 4) the entry of the injunction will serve a public interest.

The appellant argued on appeal that the appellees had failed to demonstrate the required elements of Florida Rule of Civil Procedure 1.610. Specifically, he argued that they had failed to show irreparable harm, a likelihood of success on the merits, and that such relief was consistent with public policy. He further argued that the injunction was defective for failure to require a bond.

The Fourth DCA agreed with the appellant on these points and reversed and remanded to the trial court.

Practice tip: It is important for any court order regarding injunctive relief to comport with Florida Rule of Civil Procedure 1.610.

Burden-shifting rule in alleged undue influence cases

John P. Kellar, Appellant, v. Estate of John W. Kellar, Appellee, Case No. 4D17-3019 (4th DCA 2018)

Issue: Will an appellate court overturn factual findings by the trial court?

Answer: No

This case addressed the burden-shifting rule in cases where undue influence is alleged. The opinion reiterates the long-standing tenet that a trial court's factual findings cannot be disturbed by an appellate court. The procedural aspect of the case involved the filing of a petition for administration by a decedent's surviving spouse. The decedent's son filed an adversarial counter petition for administration. At final hearing there was evidence that the son had unduly influenced his father, to his own favor, against the wife. The trial court found that the wife had proved a rebuttable presumption that undue influence occurred, and the son failed to meet the burden of the nonexistence of undue influence. Accordingly, the opinion in the trial court was affirmed.

Practice tip: This case is useful when arguing for or against the existence of undue influence at trial.

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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