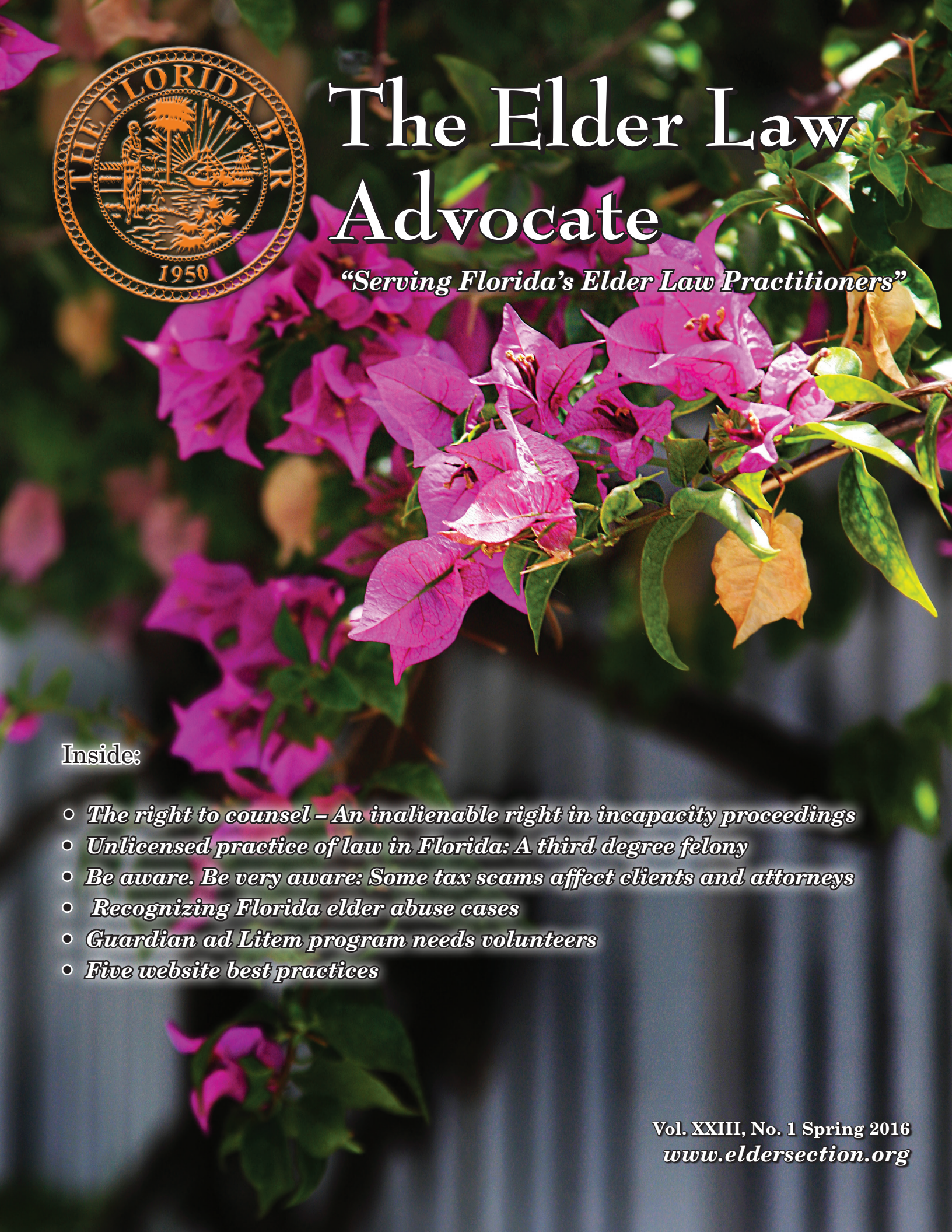


The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Inside:

- *The right to counsel – An inalienable right in incapacity proceedings*
- *Unlicensed practice of law in Florida: A third degree felony*
- *Be aware. Be very aware: Some tax scams affect clients and attorneys*
- *Recognizing Florida elder abuse cases*
- *Guardian ad Litem program needs volunteers*
- *Five website best practices*

Vol. XXIII, No. 1 Spring 2016

www.eldersection.org

The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar

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



COVER ART

Bougainvillea

by Randy Traynor

www.randytraynorphotography.com

5/2016

Contents:

Chair's message: ELS – Our goals 3
No probate for VA fiduciary accounts 4
The right to counsel – An inalienable right in incapacity proceedings 5
Unlicensed practice of law in Florida: A third degree felony 7
More than meets the eye: Courts possess greater deference regarding the appointment of personal representatives than the Florida Probate Code provides 8
Be aware. Be very aware: Some tax scams affect clients and attorneys 10
Recognizing Florida elder abuse cases 11
Section Scene 14
Board certification awards 16
ELS says farewell to Arlee . . . and welcome to Chris! 17
Three ELS members receive Pro Bono Service Award 18
Attorney Charles R. Robinson joins Special Needs Lawyers PA 19
Guardian ad Litem program needs volunteers 19
Five website best practices 20
Committee Reports 22
Tips & Tales: What is a diligent search for ascertainable creditors and why does it matter? 24
Tax Tips: Should your client file a tax return — when it is not required? 25
Summary of selected case law 27
Fair Hearings Reported 31

The deadline for the SUMMER 2016 EDITION: July 1, 2016. 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 Kristina M. Tilson at *kristinatilson@gmail.com*, or call Chris Hargrett at 850-561-5625, for additional information.

ELS: Our goals

This edition of my chair's message includes outcomes from the strategic planning meeting held Feb. 18-19, 2016.

I would like to recognize the contribution of time and dedication to the section by the members of this year's Strategic Planning Committee: Ellen Morris, Randy Bryan, Jason Waddell, Bill Johnson, Jack Rosenkranz, Jana McConnaughhay, Kara Evans, Carolyn Landon, Sam Boone, Jill Ginsburg and Collett Small.

This meeting was made possible by Randy Bryan's incredible generosity of allowing us to take over the conference room of his office for two days. The hospitality of Randy and his office staff was simply incredible, right down to the warm, freshly baked chocolate chip cookies in the afternoon. In all seriousness, if we had held this meeting at a major hotel in Orlando, it would have easily cost the section an additional $1,500. Thank you again to Randy and his staff.

The meeting was led by Karl Sprague, who has facilitated this same type of strategic planning for AFELA in past years. I thought it was important for the person facilitating this meeting to have some background knowledge of the elder law legal practice, and yet be impartial regarding the section's history and future. Karl did not disappoint! He managed to keep us on task and helped us to identify some realistic short-term and longer-term goals.

I'm going to do my best to lay out some of the goals we as a committee identified, and I have also asked that two of the members include their thoughts.

Goals of the Elder Law Section

1. Expand and formalize a rotating four-year CLE program with a winter and a summer program. The winter program will continue to be the Annual Update and The Fundamentals program we have been hosting in mid-January for the past few years. The goal is to add a mid-year or a summer program that would fall on or around the same time each year. The summer program's topics will rotate through topics such as guardianship, Medicaid, public benefits and estate planning. Although the CLE Committee will be responsible for planning the location and logistics of the twice yearly CLEs, the substantive committee for that year's topic will be responsible for the content and the speakers for the event.

2. Comprehensive review of the ELS committees. The goal is to clarify the expectations for the committees, their chairs and their members. Randy Bryan and Ellen Morris will be tasked with reviewing the current committees to determine if any of the committees should be consolidated or eliminated. Kara Evans and I will be developing a list of committee chairs' and section officers' responsibilities.

3. Budget Committee. We plan to utilize the Budget Committee to review and gain a working understanding of the Bar's newly implemented section expense and billing system. We need to assure that we have a clear understanding of what the section's financial burden will be when we host a seminar or an event.



David Hook

Message from the chair

4. Coordination with AFELA. The task force is the perfect vehicle to discuss the respective roles of the Elder Law Section and AFELA. The suggestion is for the task force to take this up as an agenda item after the legislative session is over. Ellen will also be extending an invitation to the leadership of AFELA to join the ELS at the section's annual retreat in October.

5. Legislative advocacy. It is critical that we, as a section, develop a procedure so that the substantive committees can be more responsive to proposed legislation during the legislative session. Bill Johnson and Scott Selis will be tasked with developing the procedure, with the goal of achieving 24-hour crisis response to proposed legislation.

I know that some of these goals are ambitious, but I think we have made great progress by identifying them and starting to lay out the path to their accomplishment.

Comments from committee members

I was honored to be invited by the section leadership to participate in the recent ELS strategic planning meeting. The focus of the meeting was to better implement the section's mission statement:

> The Elder Law Section exists to: (a) cultivate and promote professionalism, expertise, and knowledge in the practice of law regarding issues affecting the elderly and persons with special needs; (b) advocate on behalf of its members; and (c) perform such other activities as may be necessary and appropriate to fulfill this mission statement.

From a CLE perspective, we were able to commit to an ongoing plan for regular mid-year seminars on issues affecting the elderly and persons with special needs. Substantive committees will be tasked with developing and implementing the programs. There will be more details about the specifics of this plan in the next *Advocate*. The CLE component of the strategic plan is only one of many that were agreed on, and it was exciting to have been a part of this process.

Sam W. Boone, Jr.

At one point this past week, I told another attendee one of my favorite Zig Ziglar quotes: "You'll never make it as a 'wandering generality.' You must become a 'meaningful specific.'"

Our group helped the Elder Law Section become more of a meaningful specific. This was accomplished through a rediscovery of our mission, setting goals to further that mission and establishing timelines around those goals. From a refocus on substantive training, to better budgeting, closer examination of our committees and officers, work with other organizations and work with the Legislature, our section's focus is now better. We will not be a "wandering generality." I truly appreciate having the opportunity to be a part of this group.

Jason Waddell

No probate for VA fiduciary accounts

by Jack M. Rosenkranz

VA fiduciary accounts avoid probate despite standard thinking that this type of account requires probate because no beneficiary is named. When a beneficiary is unable to manage his or her affairs due to injury, illness or infirmities of age, the Veteran Administration appoints a fiduciary. This appointment will occur despite existing powers of attorney or a guardianship order. This is because these VA beneficiaries are at an increased risk of being exploited. The fiduciary is bonded, and reports to the VA how the funds are used.

The fiduciary's role is to protect these funds on behalf of the beneficiary. Federal law makes this clear:

> Nonassignability and exempt status of benefits
>
> (a)(1) Payments of benefits due … under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary … shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. 38 USC §5301

When a VA beneficiary dies, it is general practice to probate the VA fiduciary accounts to transfer significant dollars according to the testamentary intent stated in the will, or by intestacy. By using the probate process to transfer the funds, the funds are subject to claims of creditors. Many estates are at risk for liens for the cost of the decedent's care. Similar to the provisions of Florida's intestacy statute, the VA fiduciary is mandated to distribute funds remaining unused to the family of the veteran.

Often, elder law attorneys will assist a client in avoiding probate by naming a beneficiary on the depository agreement of a financial institution account. Due to the representative payee nature of the VA fiduciary account, however, the fiduciary is not permitted to name a beneficiary. Federal law specifies a distribution outside of probate. When a beneficiary dies, the fiduciary shall distribute to the spouse, and if she or he is not living, then to the children. Federal law also makes special provisions for mentally incompetent veterans:

> In the event of the death of a mentally incompetent or insane veteran, all gratuitous benefits under laws administered by the Secretary deposited before or after August 7, 1959, in the personal funds of patients trust fund on account of such veteran shall not be paid to the personal representative of such veteran, but shall be paid to the following persons living at the time of settlement, and in the order named: The surviving spouse, the children (without regard to age or marital status) in equal parts, and the dependent parents of such veteran, in equal parts. Title 38 USC 5502 (d)

Most executives at financial institutions are not aware of the law in this area. When brought to the attention of legal counsel, financial institutions to date have honored federal law and have made distributions outside of probate, thus avoiding estate claims. Providing an affidavit of heirs is the proper tool to use when requesting the funds to be distributed. Be aware that the VA is increasing oversight of the actions of a veteran's fiduciary, and lawyers giving advice in this area are at risk for malpractice claims.



***Jack M. Rosenkranz, Esq.**, established his elder care law firm, Rozenkranz Law Firm, in 1991. He recognized early the growing need for these services and the expanding choices under health care policy, regulations and laws. Estate planning, guardianship and elder law are the focus of his practice. He is co-chair of the Elder Law Section's Veterans (VA) Benefits Committee.*

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The right to counsel – An inalienable right in incapacity proceedings

by Enrique Zamora and Yaniel M. Cantelar

It has been said that a ward under a plenary guardianship has fewer rights than a convicted felon; however, Fla. Stat. § 744.3215 contains a list of 15 rights that a ward must always retain. We will concentrate our discussion on one of these rights, the right to counsel. Specifically, we will consider how the alleged incapacitated person (AIP) can exercise his or her right to counsel when, after the appointment of an emergency temporary guardian (ETG), the AIP has lost the right to contract.

The attorney for the AIP is defined in Fla. Stat. § 744.102(1) as "an attorney who represents the alleged incapacitated person." It does not specify if it is a court-appointed attorney or private counsel retained by the AIP, and other questions remain as well. May the AIP even retain counsel when he or she has lost the right to contract? Is an attorney required to enter into a contract with a client in order to establish representation? The Florida Bar Rules of Professional Conduct require an attorney to maintain, as reasonably as possible, a normal client-lawyer relationship with a client with diminished capacity. [1] Where do we draw the line as to how much diminished capacity is too much to permit a normal client-lawyer relationship?

According to Fla. Stat. § 744.331(2)(b), an AIP may substitute a private attorney for the attorney appointed by the court. The statute is silent, however, regarding what procedures should be followed in order to substitute the court-appointed attorney with the ward's choice of attorney. Does it require a hearing? How do you reconcile the right to counsel with the removal of the right to contract, particularly in situations when an ETG is appointed?

In *Martinez ex rel. Smith v. Cramer*, 121 So. 3d 580 (Fla. Dist. Ct. App. 2013), the 4th DCA expressly found that in non-emergency situations the AIP can retain his or her own attorney. [2] In *Jasser v. Saadeh*, 97 So. 3d 241 (Fla. Dist. Ct. App. 2012), the 4th DCA held that the AIP cannot retain his or her own attorney when the right to contract is delegated to an ETG, [3] and "… where the ward's right to contract had been removed by the appointment of a plenary guardian, she did not possess the right to contract and enter into an agreement with the attorney." [4] Does this mean that 744.331(2)(b) ceases to apply when there is an imminent threat to the AIP and the court determines that an ETG is required?

In a more recent case, the 4th DCA held that an AIP, found incapacitated by all three members of the examining committee, could enter into a valid mediation settlement agreement since the incapacity had not yet been judicially determined:

> Although three examining committee members concluded the brother lacked capacity to contract in June 2012, the reports were never considered at a formal adjudicatory hearing. And, there was never a trial court determination that the brother was incapacitated. In fact, the brother maintained that he was NOT incapacitated. Because our guardianship and probate rules do not prohibit a party from voluntarily dismissing a petition to determine incapacity, and section 744.311 does not mandate an adjudicatory hearing, the trial court did not err in finding the settlement agreement did not violate Florida law or public policy. [5]

Three potential scenarios can develop under the current provisions of Chapter 744. The first scenario is that the AIP's request to substitute private counsel for the court-appointed attorney is granted in all instances, and that it is considered a ministerial act, not a judicial decision. This scenario follows the apparent legislative intent of Fla. Stat. § 744.331(2)(b). Otherwise, it appears to be a violation of due process, as the AIP should maintain his or her rights until adjudicated incapacitated.

The second is that the court considers the request for private counsel by the AIP in a separate hearing. It is not clear, however, what role, if any, an ETG would play in this hearing when the right to contract has been removed. Would the ETG be bound to enter into a retainer agreement with the AIP's private counsel once the substitution receives court approval? Who is in charge of approving the terms of the retainer agreement such as amount of compensation, hourly rate, initial retainer, costs, etc.? Should the ETG, using substituted judgment, make such decisions?

The third scenario is the acceptance by the court of a private attorney chosen by the AIP, but retaining the court-appointed attorney as co-counsel. This scenario raises the question of excessive compensation if both attorneys are awarded fees for the work done. Is there duplication of legal services? In the case of *In re Guardianship of Rawl*, 133 So. 3d 1179 (Fla. Dist. Ct. App. 2014), from the 2nd DCA, both the court-appointed attorney for the AIP and the AIP's private counsel were awarded fees for services rendered to the AIP. [6]

It is important to note that the appointment of a plenary ETG removes the AIP's right to contract without the benefit of an adjudicatory hearing on the issue of incapacity. The 2nd DCA, in the case of *Holmes v. Burchett*, 766 So. 2d 387, 388 (Fla. Dist. Ct. App.

continued, next page

2000), stated "by failing to conduct an adjudicatory hearing before finding that Holmes did not have the capacity to contract and retain counsel of her choice, the trial court failed to establish Holmes' incapacity by due process of law."[7] Does Fla. Stat. § 744.3031(2), recently added under HB 5, address this due process concern by requiring notice to the AIP and her attorney at least 24 hours before a hearing is held on the petition to appoint an ETG, but not on the AIP's incapacity? We think not.

There seem to be more questions than answers. Some things are obvious, however. There is a need to modify Chapter 744 to clarify the procedure when the AIP decides that he or she wants private counsel. A judge's decision to add a private attorney (instead of substituting private counsel for court-appointed counsel) should not result in more fees paid from the AIP's funds. There is also a need to address the role of an ETG in this process when the right to contract has been removed. There should be a continued effort by the courts and the Legislature to address the existing gaps in due process under the current incapacity proceedings. Even if nothing is changed, however, let us not forget that the AIP's right to counsel is inalienable.



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***Yaniel M. Cantelar, Esq.**, is an associate attorney with the firm of Zamora, Hillman & Villavicencio with offices in Coconut Grove, Fla. His practice focuses on elder law, with an emphasis on the areas of probate and guardianship administration.*

Endnotes

[1] Fla. Bar Rule 4-1.14, Client Under Disability.

[2] *See Martinez ex rel. Smith v. Cramer*, 121 So. 3d 580, 582 (Fla. Dist. Ct. App. 2013).

[3] *Jasser v. Saadeh*, 97 So. 3d 241, 242 (Fla. Dist. Ct. App. 2012).

[4] *Id.*

[5] *Gort v. Gort*, No. 4D14-3830, 2016 WL 403257, at *4 (Fla. Dist. Ct. App. Feb. 3, 2016).

[6] *See In re Guardianship of Rawl*, 133 So. 3d 1179 (Fla. Dist. Ct. App. 2014).

[7] *Holmes v. Burchett*, 766 So. 2d 387, 388 (Fla. Dist. Ct. App. 2000).



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Unlicensed practice of law in Florida: A third degree felony

by John R. Frazier

Fla. Stat. § 454.23 states the following:

> Any person not licensed or otherwise authorized to practice law in this state who practices law in this state or holds himself or herself out to the public as qualified to practice law in this state, or who willfully pretends to be, or willfully takes or uses any name, title, addition, or description implying that he or she is qualified, or recognized by law as qualified, to practice law in this state, commits a felony of the third degree, punishable as provided in s.775.082, s.775.83, or s.775.84.

In 2014, The Florida Bar released a disciplinary report about an attorney who had previously been disbarred and was later convicted of the felony crime of engaging in the unlicensed practice of law. After his felony conviction, The Florida Bar permanently disbarred the attorney. This fact pattern indicates the potential seriousness of the unlicensed practice of law.

In recent years, we have seen a significant proliferation of non-attorney Medicaid planning companies. Many of these companies work with Florida licensed attorneys. Over the past few years, there have been reports of the following individuals holding themselves out as "Medicaid planners": annuity sales representatives, geriatric care managers, Florida licensed nurses, former nursing home employees, former DCF employees, a disbarred attorney, an individual who has been permanently barred from the securities industry by the Financial Industry Regulation Authority (FINRA), an insurance agent who lost his insurance license due to two felony convictions and two Florida licensed insurance agents who have been permanently barred from the securities industry by the State of Florida.

Still, there appear to be relatively few criminal prosecutions in Florida for the unauthorized practice of law (UPL). The typical criminal prosecutions for UPL crimes in Florida seem to fall into two general categories:

1. suspended or disbarred attorneys who have been accused of practicing law during the time period when they are ineligible to practice law; or

2. non-attorneys who pretend to be attorneys, when in fact they have never been licensed to practice law.

Accordingly, unless a non-attorney's actions fall into one of these two categories, a criminal prosecution for UPL in Florida appears to be very unlikely.

If you have an interest in joining the Elder Law Section's UPL Committee, or if you wish to discuss any alleged instances of UPL of which you may be aware, please contact me at 727/586-3306, ext. 104.



***John R. Frazier, JD, LLM**, is licensed to practice law in Florida and Georgia, and he practices primarily in the fields of elder law, Medicaid planning, veterans benefits law, estate planning, asset protection, taxation, probate and business organizations. He is admitted to practice before the United States Court of Appeals for Veterans Claims, and he is a member of the National Organization of Veterans' Advocates. He is chair of the Elder Law Section UPL Committee and is co-author of the book* The Medicaid Handbook: A User's Guide to Florida Medicaid *with Joseph F. Pippen, Jr.*



Judicial performance feedback sought from Bar members

The Judicial Administration & Evaluation Committee is encouraging all Bar members to participate in the Confidential Judicial Feedback Program developed by the committee and approved by The Florida Bar Board of Governors.

The purpose of the Confidential Judicial Feedback Program is to promote judicial self-improvement and enhance the quality of our judiciary as a whole. Attorneys are asked to evaluate the judge's demeanor, knowledge, fairness, and other factors, but not to discuss issues of their specific cases. The commenting attorney's identity is kept confidential and the comments are provided only to the judge who is the subject of the review. All feedback is and remains confidential pursuant to Florida Rule of Judicial Administration 2.051(c)(4).

There are separate forms for trial court judges and appellate court judges. Feedback may be provided two ways" by competing the forms online at www.floridabar.org/JudicialFeedback or by downloading the forms at www.floridabar.org/JAEC and following the instructions.

More than meets the eye: Courts possess greater deference regarding the appointment of personal representatives than the Florida Probate Code provides

by Alexander J. Hernandez and Antonio J. Soto IV

Looking at the Florida Probate Code, it would appear that courts have no discretion to refuse appointment of the personal representative (PR) named in a testator's valid will, unless such a person is expressly disqualified or the court has specific statutory discretion.[1] The Probate Code provides the following statutory disqualifications for an individual to serve as PR: "A person is not qualified to act as a personal representative if the person: (a) Has been convicted of a felony. (b) Is mentally or physically unable to perform the duties. (c) Is under the age of 18 years."[2] The order of preference for appointing personal representatives for testate estates is provided as follows: 1) the personal representative nominated by the decedent's will; 2) the person selected by a majority of the persons entitled to the estate; and 3) the best qualified devisee under the decedent's will.[3] For intestate estates, the order of preference for appointment is 1) the surviving spouse; 2) the person selected by a majority of heirs; and 3) the heir nearest in degree who is best qualified. [4]

Despite the lack of specific guidelines in the Probate Code, case law demonstrates that courts actually possess broader discretion in appointing a PR than what the statute specifies. Specifically, courts may consider unforeseen circumstances unbeknownst to the testator; evidence of the character, ability and experience of the individual willing to serve; and the general moral character of the PR named in testator's will.

Courts may decline to appoint the PR named in the will if, after the subject will's execution, unforeseen circumstances arise that clearly would have affected the testator's decision to appoint said person.[5] In *In re Maxcy's Estate*, 240 So. 2d 93, 95 (Fla. 2d DCA 1970), the decedent's widow was appointed co-PR, despite potential involvement in planning the decedent's death. There, the appellate court held that "If the County Judge had refused to appoint her [the widow] co-executor in the beginning, even though she was named in the will, such refusal would have been proper."[6]

Courts also consider evidence regarding a statutorily qualified person's character, ability and experience to serve in the important capacity demanded of an administrator of an estate. In *In re Estate of Snyder,* 333 So.2d 519 (Fla. 2d DCA 1976), the appellate court affirmed the trial court's refusal to appoint a person to serve as administrator of an intestate estate despite this person being statutorily qualified to hold the position. Specifically, the Second District Court of Appeal stated, "[w]here the record supports the conclusion that a person occupying the position of statutory preference does not have the qualities and characteristics necessary to properly perform the duties of an administrator, it would be an anomaly to hold that a probate court, which has historically applied equitable principles in making its judgments, does not have the discretion to refuse to appoint him simply because he did not fall within the enumerated list of statutory disqualifications."[7]

In *Padgett v. Estate of Gilbert*, 676 So. 2d 440, 443 (Fla. 1st DCA 1996), a father was precluded from acting as PR for his child's estate due to the father's felony convictions, despite having his civil rights restored. The appellate court held that because his civil rights were restored, Florida's Probate Code did not unequivocally preclude his appointment as PR.[8] However, the appellate court also found that the trial court could still consider the father's prior conviction, despite clemency, as evidence of his general moral character to serve as a fiduciary/personal representative.[9] When the individual applying to serve as PR is one of questionable character or history, keep in mind that probate court is an equitable forum where prior appellate record states that basic principles of reasonableness and common sense should be applied where the Florida statute falls short.



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continued, next page

SECTION NEWS

Mark your calendar!

The Florida Bar Annual Convention
June 15-18, 2016
Hilton Bonnet Creek, Orlando

ELS events at TFB Annual Convention
June 17, 2016
Hilton Orlando Bonnet Creek

- **Special Needs Trust in Florida CLE**
  8:30 a.m.-3:00 p.m.

- **Elder Law Section Awards Reception**
  3:30-4:00 p.m.

- **Elder Law Section Executive Council Meeting**
  4:00-5:30 p.m.

More than meets . . .
from preceding page

***Antonio J. Soto IV, Esq.**, is a partner and managing member of Soto & Hernandez PLLC in Coral Gables and has been admitted to The Florida Bar since 2013. He received the BBA from Florida International University and the JD from Nova Southeastern University Shepard Broad College of Law. His areas of focus are elder law with a concentration on estate planning, probate administration and litigation, guardianship administration and litigation, and real property. He is a member of the Elder Law and RPPTL sections of The Florida Bar. He can be reached by telephone at 305/567-0010 or by email at a.soto@sotohernandezlaw.net.*

Endnotes

[1] *Pontrello v. Estate of Kepler*, 528 So. 2d 441, 442-43 (Fla. 2d DCA 1988).

[2] F.S. 733.303(1).

[3] F.S. 733.301(1)(a).

[4] F.S. 733.301(1)(b).

[5] *Pontrello v. Estate of Kepler*, 528 So. 2d 441, 443 (Fla. 2d DCA 1988).

[6] *In re Maxcy's Estate*, 240 So. 2d 93, 95 (Fla. 2d DCA 1970).

[7] *In re Estate of Snyder*, 333 So.2d 519 (Fla. 2d DCA 1976).

[8] *Padgett v. Estate of Gilbert*, 676 So. 2d 440, 443-44 (Fla. 1st DCA 1996).

[9] *Id.*



Be aware, Be very aware
Some tax scams affect clients and attorneys

by Michael A. Lampert

Virtually all lawyers, and most of our clients, are well aware of identity theft and its spill over into the tax arena. Unfortunately, despite efforts by the IRS and others to stop, or at least reduce its occurrence and damage, the problem persists and can severely impact elder clients. In addition, some of these scams are now targeting practitioners. These issues are compounded by some unscrupulous tax return preparers who either outright dupe or defraud their (and our) clients, or convince them to undertake improper tax actions. Some of these scams and frauds are listed in the IRS Annual "Dirty Dozen" (IR-2016-29, Feb. 19, 2016). This article will briefly address some of these issues.

Bad tax returns

When we think of tax returns, we generally think of tax returns with honest mistakes or even tax returns incompetently prepared. Unfortunately, there are some tax preparers who are competent at either defrauding the client or convincing the client to file a false return. For example:

- Some credits, such as the earned income tax credit, require the client to actually have earned income to be able to take the credit. Sometimes the tax preparer will place fake income on the tax return to "allow" the credit. In these cases, the credit generally exceeds the income tax caused by the false income. This results in a "refund" to the client.
- Other credits, such as the fuel tax credit, have very limited applicability, yet the tax practitioner convinces the client that a credit is allowable.
- The tax preparer inflates or makes up numbers for deductions.
- The client signs a blank return and trusts the tax preparer, who tells the client that he or she will get a large refund. Sometimes the client even agrees to pay a percentage of the refund to the tax return preparer.

The author has seen every one of these situations in his tax controversy practice. While filing a false return also occurs with younger clients, when it happens to elder clients, particularly those of more limited means, the result, when discovered, can be devastating.

Phishing and threats

Fraudsters send emails and notices, and make phone calls, so much so that the IRS issued another warning on Feb. 18, 2016, noting an approximate 400 percent surge in phishing and malware so far this tax season (IR-2016-28). The calls sometimes have caller ID spoofing, where the caller ID shows up as an actual IRS or police agency phone number. Many fraudsters are very convincing. Some fraudsters attempt to obtain personal identifying information in order to commit identity theft, to access financial accounts, etc. Other fraudsters make demands for payment for "back taxes," whether real or fictitious. The callers often are very persistent and threaten the client with arrest, deportation, loss of licenses and other consequences.

The reality is that the IRS does not call people out of the blue and threaten them with arrest, nor does it initiate taxpayer contact by email. (Yes, the author does email with certain IRS officials, but the relationship is established.)

Alert 1: Unfortunately, we can expect this problem to get worse. A recent tax law change directs the IRS to utilize private collection agencies to collect certain unpaid taxes. While the author has not yet seen this implemented, when a prior program was utilized, it was problematic. The author expects any new program to result in new horror stories, particularly when private collection agencies try to collect very old taxes that the client (including the elder client) thought were "long gone." Overlay fraudsters on top of the legitimate private collectors, and what will the result be?

Alert 2: Another recent change in the law allows the IRS to have the U.S. State Department revoke or limit the passports of those with certain unresolved federal tax liabilities. While it remains to be seen just how this will be enforced and what appeals procedures will be enacted, it is yet another avenue for fraudsters to threaten the elder client.

Increasingly, phishing attacks have been directed to practitioners. If successful, the fraudster is able to access the practitioner's client information that is on a computer or in the cloud. In addition, tax preparers are getting hacked, with the fraudster preparing fraudulent returns using a practitioner's filing numbers. By the time the fraud is discovered, the fraudster is long gone.

Practice tip: In addition to normal practices to defend against online scams, do not "click through" emails purporting to be from the IRS. Go directly to *IRS.gov* or to the IRS website for which you already have login credentials.

Practice tip: Some elder lawyers have accountants on staff who prepare income tax returns for clients. Periodically, and frequently during tax filing season, log on to the e-filing system and compare the count of tax returns filed with the firm's own count of returns filed. The numbers should be the same. If they are not, suspect that there has been a hack into the firm's e-filing system.

Marketing tip: To the extent the elder lawyer has a newsletter or other educational materials that the lawyer sends to clients and friends, consider adding a warning about the scams addressed in this article.



***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.*

Recognizing Florida elder abuse cases

by Michael Brevda

Elder abuse statistics

An aging American population

The year 2010 marked a record year in the United States. For the first time in history, older Americans (age 65 and older) numbered 40 million, accounting for 13 percent of the total U.S. population.[1] This "boomer effect" is expected to grow. The U.S. Census Bureau estimates that by 2050, 20 percent of America's population will be 65 or older.[2] In 2010, America had 5.8 million seniors over the age of 85. By 2050, this number will skyrocket to 19 million.[3]

So what does this mean for Florida's aging population? Inevitably, we will see a rise in long-term care facilities such as nursing homes, assisted living facilities and long-term care hospitals. There are a number of state and federal regulations in place to protect vulnerable seniors from elder abuse and neglect in these long-term care facilities. Unfortunately, not all facilities play by the rules.

The shocking statistics

For many people, nursing home abuse and neglect evoke horrifying images of physical caretaker abuse. It is important to note that physical abuse accounts for only a small percentage of nursing home abuse and neglect cases. The National Center on Elder Abuse (NCEA) considers elder abuse and neglect to include "failures by a caregiver to satisfy the elder's basic needs or to protect the elder from harm."[4] According to the NCEA, recent studies estimate that only 1 in 14 cases of elder abuse ever comes to the attention of authorities.[5] An NCEA research brief[6] cites the following statistics:

- 3.2 million Americans resided in nursing homes during 2008;
- more than 900,000 Americans resided in assisted living facilities in 2008;
- nearly one in three U.S. nursing homes were cited for violations of standards;
- 95 percent of residents sampled stated that either they had been neglected, or they witnessed nursing home staff neglect another resident; and
- more than 50 percent of nursing home staff admitted to mistreating, neglecting or abusing nursing home residents in the prior year.

Injuries to look for in elder abuse cases

Bedsores (decubitus ulcers)

Decubitus ulcers (also referred to as bedsores or pressure sores) are preventable skin breakdowns that look like wounds on the skin.[7] These wounds commonly develop on a patient's backside and/or heels due to unrelieved pressure. If a nursing home resident is unable to reposition his or her body in bed, the facility's staff must move and reposition the resident to relieve the pressure. Failing to do this is neglect, and can result in bedsores. The Center for Medicare and Medicaid Services has deemed pressure sores to be a "never event" in health care, meaning an event that is preventable, and thus should never occur.[8]

Falls

Nursing home falls occur frequently and can be lethal. Of the 1.6 million residents in U.S. nursing home facilities, approximately half fall annually.[9] One in three of those who fall will do so two or more times in one year.[10] For an elderly resident population, a fall can be catastrophic. One in every 10 residents who fall has a serious related injury, and about 65,000 patients suffer a hip fracture each year from falls.[11] Not all falls can be prevented, but it is incumbent on the facility to assess fall risk and to have a plan in place to prevent falls. Facility falls are also referred to as "never events."[12]

Unexplained bruising and fractures

Bumps, bruises and fractures can indicate abuse and neglect in nonverbal residents, like those suffering from Alzheimer's or dementia. A serious fracture in a bedbound and nonambulatory patient may indicate a physical assault, or an attempt to conceal the dropping of the patient during a transfer. Unexplained injuries in nonverbal residents need to be investigated.

Medication errors

One of the largest profit centers for nursing homes is the in-house pharmacy.[13] Residents are often required to fill prescriptions using the nursing home pharmacy in lieu of their preferred outside pharmacy. Unfortunately, the proper medication names and dosages are not always transferred along with the resident. For obvious reasons, medication errors can cause grave injury or wrongful death.

Sexual abuse

Sexual abuse is an inconceivable, yet persistent type of assault in long-term care facilities. The overwhelming majority of elder sexual abuse victims (71 percent) live in nursing homes, and 81 percent of the time, the perpetrator is the caregiver.[14] Any complaint of sexual abuse made by a vulnerable resident must be reported and investigated immediately.

Malnutrition and dehydration

Most long-term care residents require assistance with their activities of daily living, including eating and drinking. Some residents' conditions prevent them from verbalizing their need for food and water, and tragically, these basic needs can be withheld. Dehydration and malnutrition represent the most widespread forms of neglect injury to residents in long-term facilities. It is estimated that at any given time, approximately one-third of America's nursing home residents are either malnourished or dehydrated.[15] Malnutrition presents in patients with weight loss, dry lips, a reddened mouth, muscular problems, cognitive impairment and yellowing skin.

continued, next page

Recognizing abuse . . .
from preceding page

Wrongful death

If a long-term care facility resident dies due to injuries from neglect or abuse, a wrongful death claim can be brought by the estate of the decedent and the decedent's survivors. Wrongful death claims are generally statutory in nature, and available damages vary by venue.

I suspect elder neglect: What do I do as the attorney?

As lawyers, we occupy a unique position of trust with our clients. When a loved one is injured or dies in a facility, families often turn to their lawyer to get answers. The Administration on Aging created a useful, prioritized list that outlines what you should do if you suspect elder abuse:[16]

- If the resident is in immediate danger, call 911 and get emergency medical help.
- Contact the local Adult Protective Services (APS) state agency. If you are unable to locate the proper agency, call 1-800-677-1116 for a free ElderCare Locator. In Florida, call 1-800-96-ABUSE.
- Contact the resident's outside doctor who is unaffiliated with the potentially at-fault facility.
- Contact law enforcement if the suspected abuse is criminal in nature.
- Contact an elder abuse attorney to investigate the potential claim and options.

Elder abuse lawsuits

An elder abuse lawsuit is about more than just money—it's about righting a wrong to one of our society's most vulnerable members. The sad reality is that some of the large chain care facilities are concerned with their profits first and their residents' well-being second. For this reason, an elder abuse lawsuit is sometimes the only way an aggrieved former resident can get the attention of the facility's corporate board room.

Is this a viable elder abuse case?

Screening elder abuse cases can be difficult. Family members do not always understand the complex medical issues affecting their loved one, and inevitably the resident has serious preexisting health problems. Ask these basic questions to screen out viable cases of neglect from those that should be turned down:

- Has the resident suffered a serious injury that warrants the bringing of a civil action? Smaller damage cases may not justify the cost of experts in medical liability matters.
- Was the alleged wrongdoing foreseeable? Could it have been prevented through appropriate care? If the injury is due to the resident's underlying health conditions, this may be problematic for proving causation at trial.
- How does the facility staff explain the injury? It is important to know how the facility's staff characterizes the incident/injury. Be sure to investigate independently the truthfulness of staff members' statements.
- Were outside health care providers critical of the facility? Contact any unrepresented health care providers who saw the patient after the injury. Obtain their opinions as to why the injury occurred. A neutral doctor who is critical of the facility can make your case.
- Has the State investigated the incident? If so, what were its findings? State investigations are usually inadmissible in the civil trial, but they can be helpful in gathering information and witness statements.

When in doubt, contact an elder abuse attorney. Almost all provide free initial consultations.

Screening nursing home neglect lawsuits

Nursing home neglect claims are the most prevalent elder abuse claims in Florida. Of the long-term care facilities addressed in this article, nursing homes (skilled nursing facilities) owe the highest duty of care to their residents. The nursing home residents' bill of rights is codified in Florida Statutes § 400.022, and guarantees each resident the right to be free of abuse and neglect. Skilled nursing facilities are for residents who require 24-hour monitoring and medical assistance. Due to the high level of care, nursing homes rarely contest the issue of duty. Instead, the challenge with nursing home cases is being able to prove that the injury was avoidable through good care. Generally, injuries like pressure sores, repeated falls, malnutrition and medication errors are preventable, and provide the basis for a nursing home abuse lawsuit.[17]

Screening assisted living facility lawsuits

Assisted living facilities (ALFs) occupy a growing gray area between independent living and skilled nursing facilities. ALFs are residential care facilities that provide meals, medication assistance and some support with activities of daily living. When a resident is injured, ALFs minimize their obligation to the resident by claiming their legal duty is akin to that of a landlord-tenant relationship.[18] The key to refuting this claim is examining the ALF's website, marketing materials, contract with the resident and care plan for the resident. What promises did the ALF make to the resident's family? Did the ALF identify the resident's care needs before the injury? If the ALF failed to recognize the resident's potential risk for injury, this can be an actionable claim. If the ALF recognized the resident was high risk and that it could not provide the appropriate level of care, the ALF may be liable for failing to send the resident to a higher-level facility.

Screening home health aide injury lawsuits

Due to societal stigma against placing a loved one in a facility, home health care is an attractive alternative to a nursing home. Unfortunately, not all home health aides are created equal. Home health aides do not usually have individual malpractice insurance. The home health agency typically does, but suing a home health care agency can be tricky. If a patient is injured, the agency that provided the aide quickly disavows responsibility and claims the aide is merely an independent contractor. Liability can attach to the agency, however, through

the legal theory of actual agency. The key to proving actual agency is to establish that the company had the right to control the aide.[19] Control can be established in litigation by deposing the aide and determining that the agency created the aide's schedule, provided the aide's clients and created policies that determined parameters of the care provided to patients.

Valuing elder abuse settlement offers

Many injury attorneys shy away from elder abuse claims because they are difficult to prosecute and are misconstrued as minimal damage cases due to the injured party's preexisting conditions. There are many peripheral factors that can increase the value of your potential claim, including the availability of punitive damages,[20] attorney fees through a Chapter 415 action[21] or a potential qui tam action for corporate wrongdoing.[22] Unfortunately, there is no formula to determine a fair value on these kinds of cases. Obtain all health insurance liens, funeral bills, out-of-pocket expenses and any other economic damages before computing the noneconomic damages (intangible damages like pain and suffering). Do not underestimate the value that juries place on a senior's suffering. Despite a victim's advanced age, Florida juries have awarded in excess of $1 million in elder neglect cases. [23] Whether you plan to handle the case yourself, or co-counsel with an elder abuse attorney, it is imperative to know how to evaluate elder abuse cases properly in order to maximize your client's recovery.



***Michael Brevda, Esq.**, is an equity shareholder at the law firm of Domnick, Cunningham & Whalen. He focuses his practice on litigating elder abuse cases such as those claims involving nursing home abuse, ALF negligence and hospital neglect. When not trying cases, he regularly lectures seniors on their rights in long-term care facilities. He can be reached at 561/409-0132 or mjb@dcwlaw.com.*

Endnotes

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[9] http://www.ahrq.gov/professionals/systems/long-term-care/resources/injuries/fallspx/fallspxman1.html

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[17] "Overview of Common Nursing Home Liability Issues," Julie Braun, National Academy of Elder Law Attorneys, November 2001.

[18] "Involuntary Discharge: Is an Assisted Living Facility Resident Really a Tenant By Another Name?" Candace Kilpinen, Valparaiso Law Review, 2010.

[19] "The standard for determining whether an agent is an independent contractor is the degree of control exercised by the employer or owner over the agent. More particularly, it is the *right* of control, and not *actual* control, which determines the relationship between the parties." *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 853 (Fla. 2003).

[20] *Beverly Enterprises–Florida, Inc. v. Spilman*, 661 So.2d 867 (Fla. 5th DCA 1995).

[21] *Bohannon v. Shands Teaching Hospital and Clinics, Inc.*, 983 So.2d 717 (Fla. 1st DCA 2008).

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[23] *Fundamental Long Term Care Holdings, LLC v. Estate of Jackson*, 110 So.3d 6, 8 (Fla. 2d DCA 2012); *Trans Health Mgmt. v. Nunziata*, 159 So. 3d 850 (Fla. 2d DCA 2014); *Beverly Enterprises–Florida, Inc. v. Spilman*, 661 So.2d 867 (Fla. 5th DCA 1995); *Schron v. Nunziata*, 136 So. 3d 684, 685 (Fla. 2d DCA 2014).

SECTION SCENE

Essentials of Elder Law & Annual Elder Law Update



Twyla Sketchley (past chair, ELS) and Jessica Leigh Eldridge



Imani A. Boykin, Clive M. Ryan, Charles R. Fawsett and Debra Dandar



N. Alex Hanley (CEO, Jurisco), Keith Seago (Comerica Bank Guardian Angels Program) and Jason Waddell (treasurer, ELS)



Steve Hitchcock presents Social Security Update.



Carolyn Landon (co-chair, Guardianship Committee), Ellen Morris (chair-elect, ELS)



Sam Boone (chair, CLE) and Charlie Robinson (past chair, ELS)

SECTION SCENE



Felicia Jordan, Jason Waddell (treasurer, ELS), N. Alex Hanley (CEO, Jurisco), Collett Small (chair, Substantive Committee; co-chair, Annual Update), Keith Seago (Comerica Bank Guardian Angels Program), William "Bill" Johnson and Twyla Sketchley (past chair, ELS)





Annual Update attendees receive case law updates from 2015.



Collett Small (chair, Substantive Committee; co-chair, Annual Update), Jason Waddell (treasurer, ELS), John Clardy (past chair, ELS) and Enrique Zamora (past chair, ELS)



Juan Antunez and Sophia Lopez



David Hook (chair, ELS) and Joan Nelson Hook (past chair, ELS)



Randy Bryan presents Medicaid Planning Strategies.

SECTION NEWS



The leadership of AFELA gather for the AFELA Unprogram in December. Pictured here are Emma Hemness, Jill Burzinsky, Twyla Sketchley and Cari Moss with Catherine Seal, president-elect of the National Academy of Florida Elder Law Attorneys.

The Practice Resource Institute

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

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

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- Access shareable electronic tools, web-based archives of articles, blog posts, and podcasts.
- Sign up to be notified of the latest updates.



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SECTION NEWS

ELS says farewell to Arlee . . .

Arlee Colman, administrator for the Elder Law Section for the past 15 years, is leaving her post with the ELS and taking a new assignment as communication coordinator for Legal Specialization and Education with The Florida Bar. In her new position, she will be doing promotional work for the Bar's certification programs to attorneys at annual meetings and public awareness programs to the general public.

Arlee will be missed as she has helped steer the section through the past 15 years of growth and technological changes in the way the section communicates. Arlee began her administrative duties when Ken Rubin was chair.

When I interviewed Arlee recently, she shared with me that soon after beginning her work with the lawyers in the Elder Law Section, she would no longer stand for bad lawyer jokes because she worked with too many good people. Arlee also remembered when Chair Emma Hemmness welcomed Scott Sellis into the "Kumbaya" Section!



Administrative Committee Chair Randy Bryan and ELS Administrator Arlee Colman at the Essentials of Elder Law & Elder Law Update in Orlando

Few people know that Arlee came to work with The Florida Bar after serving as a photo journalist in the U. S. Coast Guard. More people know about Arlee's artistic talents. Her artwork has been featured on the cover of *The Elder Law Advocate*.

The motto for the Coast Guard is *Semper Paratus*, Always Ready. For the past 15 years, the Elder Law Section has found Arlee to exemplify that motto as our able administrator, and we wish her the very best success as she charts her next course. Thank you, Arlee.

Joan Nelson Hook
ELS Past Chair

. . . and welcome to Chris!



The Elder Law Section welcomes Christopher C. Hargrett, new program administrator for the section. Chris is a native of Tallahassee, Florida, where he and his wife, Kendal, live.

Chris has been employed with The Florida Bar for over 10 years and has worked in a few departments, including Lawyer Referral Service, the Attorney Consumer Assistance Program (ACAP) and the Center for Professionalism. Most recently, he served as the program coordinator in the Center for Professionalism. His experience includes planning and marketing events, coordinating education courses for the Leadership Academy, designing and managing web content and producing newsletters.

In 2011, Chris earned his bachelor's degree in hospitality management from Florida State University Dedmon School of Hospitality. He is pursuing his master's degree in communications online from Syracuse University Newhouse School of Public Communications and is set to graduate in 2017.

Chris is extremely excited to work with and serve the members of the Elder Law Section.

MEMBER NEWS

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

The 2016 Pro Bono Service Awards ceremony was held on Jan. 28, 2016, at the Supreme Court of Florida. The annual Pro Bono Service Awards recognize outstanding commitment to providing legal services to Florida's poor.

The Florida Bar President's Pro Bono Service Award was established in 1981. Its purpose is twofold: 1) to further encourage lawyers to volunteer free legal services to the poor by recognizing those who make such public service commitments; and 2) to communicate to the public some sense of the substantial volunteer services provided by Florida lawyers to those who cannot afford legal fees. This award recognizes individual lawyer service in each of Florida's specific judicial circuits.

The Elder Law Section is pleased to recognize three section members who received the prestigious TFB President's Pro Bono Service Award.



Patricia Vail
4th Judicial Circuit
(Clay, Duval and Nassau counties)

Patricia Vail retired in 2003 after a legal career that included work in the Office of the Attorney General in Ohio and a long tour as a staff attorney with CSX Transportation in Jacksonville. She also was a liaison with the American Bar Association's Central and Eastern European Law Initiative, heading an office in Kazakhstan and working with that country's Supreme Court on the establishment of an independent judiciary.

Later, Vail returned to Jacksonville to open a private practice. She then found a new direction as state pro bono coordinator with Florida Legal Services and working in a number of positions with Jacksonville Area Legal Aid.

In retirement in Jacksonville, Vail has hardly slowed. She is a resource as a pro bono attorney "on call" in a number of Northeast Florida senior centers and HUD residential facilities. In 2011, she initiated an effort that became the Advance Directives for Seniors Pro Bono Project. The project—a partnership of Jacksonville Area Legal Aid, Florida Coastal School of Law, the Jacksonville Bar Association and the Northeast Florida Paralegal Association—serves 60 to 80 seniors each year with complete advance directive packets. In 2015, the project expanded to include senior patients at medical clinics and rural Council on Aging campuses. Vail is a graduate of the Cleveland Marshall Law School.



Jason A. Waddell
1st Judicial Circuit
(Escambia, Okaloosa, Santa Rosa and Walton counties)

Jason A. Waddell graduated from Cumberland Law School at Samford University in Alabama in May 2001 and headed for Northwest Florida. It wasn't much later that the terrorist attacks of September 11 dealt a blow to the economy, and Waddell found that the job market had dried up—especially for somebody without connections in the community. However, many local lawyers and others in Pensacola offered Waddell guidance and support as he worked to build his practice. Within two years, his practice was large enough that he could add his wife as a partner—creating Waddell & Waddell PA—and he has been finding ways ever since to say thanks. Waddell contributes about 50 hours a year in direct pro bono efforts.

Recently, working with Legal Services of North Florida and the Council on Aging of Northwest Florida, Waddell led the development of a program on advanced directives. Through two free CLE courses, lawyers and paralegals received documents and guidance as well as a refresher on durable power of attorney.

After the CLE and two presentations to Council on Aging groups, Legal Services of North Florida conducted two workshops at which, with Waddell's assistance, about 10 lawyers provided 33 people with assistance and documents free of charge.



Mary K. Wimsett
8th Judicial Circuit
(Alachua, Baker, Bradford, Gilchrist, Levy and Union counties)

Mary K. Wimsett, a graduate of the University of Florida Levin College of Law, has a solo practice in Gainesville. She began volunteering with the Guardian ad Litem program when she was a new lawyer. Today, she usually is representing four or five children pro bono as a guardian ad litem and attorney ad litem or through Three Rivers Legal Services.

Since 2006, she has worked with the Partnership for Strong Families and Children's Home Society to find adoptive homes for children. The state provides a minimal fee for prospective parents, so Wimsett often absorbs the extra costs and time of travel, filing fees and other expenses. She also is a frequent resource for foster families that call for advice and assistance.

In 2010, Three Rivers Legal Services rarely handled adoptions, but when Wimsett became a volunteer attorney, she quickly became the person to answer questions, provide support to staff and accept referrals. When she added elder law to her expertise, she began to accept referrals in this area, too.

Wimsett was instrumental in establishing the Gerald T. Bennett Inn of Court, which focuses on professionalism, and she now serves as its president.

MEMBER NEWS

Attorney Charles F. Robinson joins Special Needs Lawyers PA



Special Needs Lawyers PA has strengthened its expanding elder law practice in Clearwater with the arrival of attorney Charles F. Robinson. Charlie was previously with the Law Offices of Charles F. Robinson.

Charlie is a board certified elder law attorney who has practiced in Clearwater since 1967. His practice specializes in elder law, including asset protection planning (Medicaid), incapacity planning, veterans benefits planning, disability planning, special needs planning, probate and fiduciary services (trust and estate administration). He is a futurist with special focus on the future of the legal profession. Charlie has an AV Martindale rating, has the highest AVVO rating available, was listed in *Florida Trend Magazine's* Legal Elite in elder law and has been listed in Tampa Bay Super Lawyers for the past 10 years.

Over the years Charlie has made a phenomenal difference in the community, region and state in the area of elder law and special needs. He is a wealth of knowledge and is quite willing to share it, be it on a board or a committee, by presenting at a meeting or a conference, or by involving himself in activities that serve to enhance the lives of older persons and/or those with special needs. He is one of the Clearwater area's strongest advocates for seniors and also a person with a great heart and personality. Charlie was the second person to receive The Spirit of Hope Award from The Arc Tampa Bay.

Charlie is a popular speaker with professionals and lay people locally as well as nationally on the topics of elder law and the future of the legal profession. Charlie received the AA from St. Petersburg Junior College and the BA and JD degrees from the University of Florida.

Charlie's memberships include past president of the Area Agency on Aging board, vice chair of the Department of Elder Affairs (DOEA) Advisory Council, president-elect of the Florida Council on Aging, secretary-treasurer of the Baycare Alliant Hospital board, member of the Executive Council for The Florida Bar RPPTL and Elder Law sections and fellow of the American College of Trust & Estate Council (ACTEC). Charlie is a past chair of the Elder Law Section and the Law Practice Division of the American Bar Association (ABA) and a past member of the ABA Commission on Law and Aging.

Special Needs Lawyers PA is an elder law practice focusing on developmental disability assistance, guardianship, elder law, estate planning, probate, Medicaid benefits, special needs trusts and veterans benefits.

Guardian ad Litem program needs volunteers

The Guardian ad Litem program needs our help, especially in Broward County. Look at these statistics:

- Number of children in dependency: 32,000+ statewide, almost 3,000 in Broward County alone
- Number of volunteers: 7,600+ statewide, 550+ in Broward County
- Number of children waiting for a volunteer: 5,500+ statewide, 900+ in Broward County

Unfortunately, the Palm Beach numbers are similar to Broward. If you have any free time, please consider volunteering. If any of your active senior clients have free time, please consider suggesting they volunteer.

Please contact David Weintraub at daw@stockbrokerlitigation.com or 954/693-7577 if interested, or for more information.

PRACTICE MANAGEMENT

Five website best practices for law firms

by Audrey J. Ehrhardt

Mobile searches account for more than half of all internet searches. Think of your clients asking legal questions on their smartphones or tablets; are you positioned to answer them quickly and effectively? Whether you have a well-established website or are just getting started, choosing how to reach your daily audience of smartphone users is an important decision for your practice.

1. Get mobile

A mobile-friendly website is responsive. This means your website's content, structure and brand adapt seamlessly to the mobile platform on which your audience is searching. Without excellent mobile responsiveness, your visitors (your future clients) are going to leave without taking action with your firm. Further, Google's ranking algorithms penalize you when your website is not optimized for smartphone use. If you've been wondering why you no longer show up on the first page of search engine searches in your area, this could be one of the reasons. You can find out if your design is mobile friendly by typing your webpage URL into Google's Mobile-Friendly Test at *www.google.com/webmasters/tools/mobile-friendly/*.

2. Be social strategic

Think of your digital marketing like going fishing—you cast out your social media posts with the purpose of catching readers to pull them into your office for a first appointment. To break it down, each of your social accounts (your net) should be linked to your firm's blog (your boat) that has an obvious and easy call-to-action for appointment setting (your dinner table). Social posts need to be designed strategically to link back to your website in a way that best fits your current marketing campaign. Although you can link your posts back to your website without a blog, this results in a static amount of material to work with and you will be limiting the conversion ability of your social campaign.

3. Refresh for SEM (search engine marketing)

Gone are the days when the internet spoke caveman-esque language (e.g., think *city*, *practice area*, *attorney*). Search engine algorithms frequently update their methods, enhancing them to meet the needs of the consumer. This means your website needs to adapt consistently to respond to the changes. The current, most demonstrative feature is the change to long-tail searches. Your readers are now asking who, what, when questions, and you need to be at the forefront of answering them. If you haven't already, it is time to give your website content a refresher to make sure you're answering the questions your potential audiences are asking.

4. Be Google friendly

Chances are your clients are sending you emails using their Gmail account, found your number through a Chrome search and are using Google Maps to locate your office. You need to claim your Google business presence to be sure it is as easy as possible for your clients to find you. No one is saying you have to use the Google suite of services such as docs, calendar and drive, but you do need to claim your presence. The 10 minutes it takes to make sure your business is easily located through Google will be well worth your effort. You can check on your business presence or get started at *www.google.com/business/*.

5. Audit yourself (digitally)

When you digitally audit yourself, chances are you will show up in more than 25 search results. Chances are good that you only knew about 10 of these search results, and are actively managing only five places where you have a digital presence. You need to audit your digital presence frequently and actively manage it to make sure you are in control of your (and your law firm's) brand, and that it is consistent with your website presence. To start, clear the cache on your browser window and use an incognito feature to take a hard look at where you show up and what is being said.

As an elder law attorney, you may question the importance of digitally enhancing your practice. Keep in mind that senior smartphone usage is on a rapid rise in the United States and that the need to be mobile is more important than ever. Additionally, don't forget to expand your thinking to include digital audience development with both your professional network of contacts and the many adult children who are looking for elder law resources for their parents.



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

Committees keep you current on practice issues

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

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continued, page 23

COMMITTEE REPORTS

Guardianship Committee

Carolyn Landon and Victoria Heuler, co-chairs

The Guardianship Committee has been meeting by telephone at 12 noon on the second and fourth Wednesdays of every month.

We reviewed F.S. 409.9131, regarding special provisions relating to the integrity of the Medicaid program, and 744.705(1), regarding costs of public guardian. We proposed language for both.

We also reviewed House Bill 259, regarding creation of F.S. 709.2209 for a power of attorney for temporary care of a minor child. The committee had no objections to the proposed legislation, which was designed as an alternative to the Department of Children & Families' custodial involvement where temporary custody changes are needed for minors in dependency cases. The bill passed in the House but died in the committee process in the Senate when the Legislature adjourned.

Senate Bill 232 by Senator Detert passed both the Senate and the House (substituted for HB 403 by Rep. Ahern) and was signed by the governor. This legislation renames the Statewide Public Guardianship Office to the Office of Public and Professional Guardians, revises the duties and responsibilities of the executive director for the Office of Public and Professional Guardians and provides that a guardian has standing to seek judicial review pursuant to specified provisions if his or her registration is denied.

If you are interested in joining the Guardianship Committee, please email Victoria Heuler at *victoria@hwelderlaw.com* or Carolyn Landon at *carolyn@landonlaw.net*.

Law School Liaison

Alex Cuello and Enrique Zamora, co-chairs

St. Thomas Law School held its fourth annual Elder Law Symposium, in conjunction with the Elder Law Section, on March 11, followed by an executive council meeting. This year ELS Chair David Hook, a graduate of St. Thomas Law School, was one of the speakers. The number of law students that have joined the section continues to increase. There is interest in starting an Elder Law Society at the University of Florida. Stay tuned for our next report.

Mentoring

Stephanie Villavicencio, chair

In February our committee hosted our regularly scheduled Tricks of the Trade conference call. Guest speaker David Mangiero discussed special needs trusts as they relate to divorce and child support proceedings. Our next Tricks of the Trade call is scheduled for June 9 at 12 noon. The topic and speaker will be announced via email to all members of the committee two weeks prior to the call. All section members are welcome to review our website committee page to review past speakers and their respective materials.

Unlicensed Practice of Law Committee (UPL)

John Frazier, chair

A primary goal of the UPL Committee is to increase and maintain awareness of the UPL problem, both among attorneys and the public. Since The Florida Bar UPL investigative process is "complaint driven," it is critical that when alleged instances of UPL are encountered, attorneys and their clients are willing to file UPL complaints. Therefore, it is a primary goal of the UPL Committee to encourage and to facilitate the filing of UPL complaints with The Florida Bar, under circumstances where the filing of a UPL complaint would be appropriate.

Since the last report, the Florida Supreme Court has approved the Medicaid Planning UPL Advisory Opinion, and the UPL Committee will continue to increase awareness of potential problems associated with non-attorney Medicaid planning UPL. A number of UPL investigations into the conduct of non-attorney Medicaid planners has resulted in The Florida Bar issuing a "Letter of Advice" to these non-attorney Medicaid planners. These letters contain a description of the Florida Supreme Court's Advisory Opinion, and outline which activities are permissible for the non-attorney.

The UPL Committee holds a monthly teleconference on the third Tuesday of every month at 4 p.m. For more information about attending the teleconference, please contact John Frazier, chair of the committee, at *john@attypip.com*.

Committees . . .
from page 21

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

COMMITTEE REPORTS

Abuse, Neglect & Exploitation

Erika Dine and Amy Mason Collins, co-chairs

The committee is working on developing its major annual event, which is a workshop cosponsored with the Office of the Attorney General. This year we are bringing in the assistance of Stetson University School of Law to cosponsor and further develop the program. This will be the fifth year we have participated in the joint workshop. The workshop is intended to bring together elder law attorneys, in both criminal and civil law practices that serve clients who have been exploited, law enforcement investigators who are on the front lines of investigation and prosecutors who must carry the cases forward. The date of this year's workshop is still to be determined, but we anticipate it will be a one-day program (rather than three days) either in September or October, likely in the Tampa area.

The committee continues to assist the Elder Law Section's Legislative Committee in the review of proposed or to-be-proposed legislation related to abuse, neglect and exploitation. Also, in November, David Weintraub gave the committee an impressive presentation titled "Avoiding the Negligent Referral."

The committee is looking into creating a list of individuals and organizations for elder law attorneys to contact when they receive an exploitation case in their offices.

Meetings are by conference call and are held on the first Thursday of every month at 11 a.m. Central/12 noon Eastern. If you are interested in participating or joining the ANE Committee, please contact Amy Mason Collins at *amy@mclawgroup.com* or Erika Dine at *erika@dinelaw.com.*

What is a diligent search for ascertainable creditors and why does it matter?

The tale: You just received a call from a former client. Her mother passed away a little less than two years ago. Your client was the sole heir. You assisted her with a formal probate administration and explained to her why it was necessary to publish a notice to creditors, and separately notice creditors that she was aware of or could reasonably ascertain. You also explained that this would limit the amount of time that a creditor could file a claim against her mother's estate. Her problem is that an "overlooked" creditor has filed a claim. She wants to know if she has to pay.

The tip: Your answer will depend on whether this particular creditor was "reasonably ascertainable." To research this question, you must review three statutes: F.S. 733.2121, 733.702 and 733.710. Let us start with F.S. 733.710. This is a jurisdictional statute of "nonclaim," which cannot be waived or extended. If a person has been dead for two or more years, then no new claims presented against the estate are allowed. If an estate is opened within two years of death, F.S. 733.2121 requires the personal representative to publish a notice to creditors once a week for two consecutive weeks. That same statute also requires the personal representative to make a "diligent search" for "reasonably ascertainable" creditors, and serve a copy of the notice on those creditors. F.S. 733.702 then limits the creditors' time to file claims to "on or before the later of the date that is three (3) months after the time of the first publication of the notice to creditors or, as to any creditor required to be served with a copy of the notice to creditors, 30 days after the date of service on the creditor."

Recently there has been some confusion as to exactly what these statutes mean. In *Morgenthau v. Estate of Andzel*, 26 So.3d 628 (Fla. 1st DCA 2009), the First District Court found that even if the creditor was reasonably ascertainable, the fact that he was not served with a copy of the notice limited his time to file a claim to the three months after publication of the notice. In *Lubee v. Adams*, 77 So.3d 882 (Fla. 2d DCA 2012), the Second District Court found against the creditor for similar reasons. The Fourth District Court found otherwise in *Golden v. Jones*, 126 So.3d 390, 390 (Fla. 4th DCA 2013). Recognizing the jurisdictional split, the Florida Supreme Court heard the case of *Jones v. Golden*, and agreed that as a matter of due process, a reasonably ascertainable creditor is entitled to actual notice rather than just the general publication. The Florida Supreme Court expressly stated "we approve the decision of the Fourth District in *Golden* and disapprove the decisions of the First District in *Lubee* and the Second District in *Morgenthau.*" *Carol Ann Jones v. Edward I. Golden, etc.*, No. SC13-2536 (Fla. Oct. 1, 2015). As a result, claims of known or reasonably ascertainable creditors of an estate who were not actually served with a copy of the notice to creditors are timely if filed within two years of a decedent's death.

Tips & Tales

by Kara Evans



So, what is a "reasonably ascertainable" creditor? This is an evidentiary matter, and it would need to be proven that a creditor allegedly known to a decedent was in fact reasonably ascertainable by the personal representative. The "diligent search" required by F.S. 733.2121 should, however, reveal any reasonably ascertainable creditors. So, what is a diligent search? The committee notes to Probate Rule 5.241 that cover notice to creditors provide in part: "The steps to be taken by a personal representative in conducting a diligent search for creditors depends, in large measure, on how familiar the personal representative is with the decedent's affairs. Therefore, the committee believes it is inappropriate to list particular steps to be taken in each estate, since the circumstances will vary from case to case." This is not very helpful! Here are some practical steps you can take:

1. Review financial records. Bank statements may reveal online accounts that are not evident from a search of the decedent's mail. Check credit reports and past years' tax returns.

2. A look through the decedent's wallet or purse may reveal credit cards.

3. Have the personal representative forward the decedent's mail to his or her house.

4. Review the Medicare summary notices that are mailed out to every Medicare recipient. These will be helpful in ascertaining any medical bills for which an individual may be responsible.

Remember, the personal representative is not liable for serving notice where none was due, so when in doubt, serve!

Should your client file a tax return– when it is not required?

TAX TIPS



by Michael A. Lampert

Certainly, many clients must file an income tax return. For example, for 2015, a return is required if the client was single and under age 65 with income of at least $10,500. There are filing thresholds for other filing situations, and the thresholds are adjusted annually. Returns may also be required if the client is self-employed or is a dependent of another taxpayer.

It is not uncommon for elder clients to be told correctly that their income is low enough that they are no longer required to file a federal income tax return. There are some circumstances, however, where a return is not required, but should nonetheless be filed. This article will address some of these circumstances.

Withheld taxes are paid

Perhaps the most common reason for filing an income tax return is to obtain a refund of withheld taxes or of estimated tax payments. Remember that the client generally has two years from payment to request a refund (although if paid prior to the return's due date, the clock generally starts at the due date).

Tax tip: It is not uncommon for clients to lose the potential refund by waiting too long to file a return and request a refund. Likewise, be alert to the possible need to timely request a refund when administering a decedent's estate.

Premium tax credit

To claim the premium tax credit, if your client is eligible, a return needs to be timely filed. Likewise, if your client wants the advance payment of the credit sent to his or her insurer, a return also must be filed.

Earned income tax credit (EITC)

Did your client work and earn less than $53,267 in 2015? The client might be eligible to receive EITC as a tax refund. If your client qualifies, with or without a qualifying child, your client may be eligible for a credit of up to $6,242. Use the 2015 EITC assistant tool on *IRS.gov* to find out if your client qualifies. If your client qualifies, a tax return is needed to claim the credit.

Child tax credit

Does your client have at least one child that qualified for the child tax credit? If your client does not receive the full credit amount, the client may qualify for the additional child tax credit. Again, a tax return is needed to claim these credits.

American opportunity tax credit (AOTC)

The AOTC is available for four years of post secondary education, and can be up to $2,500 per eligible student. Your client, your client's spouse or your client's dependent(s) must have been a student enrolled at least half time for at least one academic period. Even if your client does not owe any taxes, your client still may qualify. Form 8863, Education Credits, needs to be completed and filed with your client's return to claim the credit. Use the interactive tax assistant tool on *IRS.gov* to see if your client can claim the credit. The IRS also has an education credits webpage.

continued, next page

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.

Advertising rates per issue are:		
	Full Page	$750
	Half Page	$500
	Quarter Page	$250

The newsletter is mailed to section members, Florida law libraries and various state agencies. Circulation is approximately 1,900 in the state of Florida. Interested parties, please contact Chris Hargrett at *chargrett@floridabar.org* or 850/561-5625.

Tax Tips . . .
from preceding page

What is interesting about these credits is that your client may potentially "get back" more than he or she paid in taxes.

Starting the statute of limitations clock

The IRS generally has three years to propose a tax increase on a filed income tax return, six years if it is a substantial understatement of tax and no time limit if there is fraud. There is no statute of limitations, however, on assessing additional income tax if there is no return filed. While it is rare for the IRS to propose taxes on unfiled returns that are older than six years, the IRS can and sometimes does. In some situations, it is worthwhile to file an income tax return just to start the statute of limitations clock ticking—the author occasionally has returns filed for clients that literally have all zeros on the returns.

Attempting to obtain a lower tax due balance

After a return has been filed, sometimes the client learns that there has been an error that resulted in more tax showing as due than it should have. Some of the many reasons why this could occur include: not having claimed the insolvency exception on cancellation of indebtedness income; not showing correct basis in an asset that results in a miscalculation of gain and therefore an incorrectly high tax due; and improperly failing to report the gain on a sale of a primary residence as being from the sale of a qualifying residence. These are just a few examples. The author has seen cases where all qualifying dependents are not listed, significant properly documented business expenses were omitted, etc. In many of these cases, an amended tax return should be filed.

Tax tip: Remember the two-year request for refund rule. An amended return can be filed after the two years in an effort to reduce any balance due. Unless an exception to timely filing applies, however, if the amended return/request for refund is filed late, the refund opportunity will be lost.

***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.*



Summary of selected case law

by Diane Zuckerman

Petitioner's right to dismiss suit

Adam Gort and Lisa Forman, Appellants, v. William Gort, Appellee, Case Nos. 4d14-3830, 4d15-398 (4th DCA, Feb. 2016)

This guardianship case, out of the Fourth District, stands for the proposition that a petition to determine incapacity can be voluntarily dismissed by the petitioner, without having an adjudicatory hearing on incapacity. In its decision, the appellate court determined that the guardianship statutes are silent on whether an adjudicatory hearing must be held each time a petition to determine incapacity is filed. Further, the appellate court noted that the guardianship statutes are silent as to whether a petition for incapacity can be voluntarily dismissed. In its conclusion, the appellate court relied on *Katke v. Bershe* 161 So. 3d 574 (Fla. 5th DCA 2014), indicating that a plaintiff's right, and thus a petitioner's right, to voluntarily dismiss its own lawsuit is absolute.

The trial court proceedings involved an older brother who filed a petition to determine incapacity, petition for appointment of emergency temporary guardian and petition for limited guardianship of his younger brother. A cousin of both brothers also filed a petition to determine incapacity of the younger brother, and a competing petition to be appointed guardian if incapacity was determined. The court ordered an examining committee, and all three members found that the younger brother was incapacitated to contract.

Prior to the hearing on the adjudication of incapacity, the court ordered the parties to mediation. At mediation, the parties reached a settlement agreement wherein the cousin and the older brother would dismiss all the pending petitions, in consideration for the younger brother communicating with the older brother regarding medical events, providing copies of financial statements and the designation of a neutral party to keep lines of communication open. All petitions, including incapacity petitions, were voluntarily dismissed, and the settlement agreement was filed with the court. A year later, a dispute arose among the brothers, and both filed motions. The older brother sought to enforce the settlement agreement, and the younger brother sought to rescind it, alleging he was under duress. A final summary judgment was entered enforcing the settlement, in favor of the older brother. This appeal followed.

In upholding the trial court, the court distinguished the facts in this case from its prior ruling in *Jasser v. Saadeh*, 97 So. 3d 241 (Fla. 4th DCA). The difference in the *Jasser* case was that the ward had his rights transferred to an emergency temporary guardian prior to signing a trust agreement. Therefore, unlike the younger brother here, Jasser had lost his right to contract, and accordingly the trust agreement was void. Since no examining committee reports had been admitted into evidence in the instant case, there was no evidence of incapacity, and therefore the settlement agreement signed by the younger brother was deemed valid and was upheld.

Standard for determining trustee fees

Robert Rauschenberg Foundation, Appellant, v. Bennet Grutman, Bill Goldston, and Darryl Pottorf, as trustees of the Robert Rauschenberg Revocable Trust, Appellees, Case No. 2D14-3794 (2nd DCA, January 2016).

This case determines the standard for determining trustee fees. This appeal challenges fees awarded to three trustees for trust administration services in the amount of $24.6 million. The case involved the administration of the estate of Robert Rauschenberg. The sole beneficiary of his estate was the Robert Raushenberg Foundation, which challenged the fee.

The appellate court noted that the trust agreement did not contain a provision for trustee fees. In the trial court hearing there was a disagreement regarding what methodology should be used to determine the fees. The trustees claimed entitlement of fees of up to $55 million, arguing that their fees should be based on factors set forth in *West Coast Hospital Ass'n v. Florida National Bank of Jacksonville,* 100 So. 2d 807 (Fla. 1958). The beneficiary asserted that the trustees were only entitled to $375,000, based on the lodestar method enunciated in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d. 1145 (Fla. 1985). It should be noted that in *Rowe*, the court was determining appropriate attorney fees, not trustee fees.

The trial court applied the *West Coast* standard, and awarded the three trustees fees in the amount of $24.6 million.

In affirming the trial court's award, the court reiterated the *West Coast* factors, providing that the court consider factors of

> the amount of capital and income received and disbursed by the trustee; the wages or salary customarily granted to agents or servants for performing like work in the community; the success or failure of the administration of the trustee; any unusual skill or experience which the trustee in question may have brought to his work; the fidelity or disloyalty displayed ty the trustee; the amount of risk and responsibility assumed; the time consumed in carrying out the trust; the custom in the community as to allowances to

continued, next page

> trustees by settlors or courts and as to charges exacted by trust companies and banks; the character of the work done in the course of administration, whether routine or involving skill and judgment; any estimate which the trustee has given of the value of his own services; payments made by the cestuis to the trustee and intended to be applied toward his compensation.

Notably the Second District referred to the subsequently enacted trustee fee statute, F.S. § 736.0708(1), which provides for fees that are "reasonable under the circumstances," but omits a methodology for determining what is reasonable. In reviewing the legislative history of the statute, the Second District determined that the *West Coast* case was cited in the Senate staff analyses in support of the bill. The legislative history showed no basis for adopting the *Rowe* standard, which is applicable to attorneys and personal representatives, and therefore was inapplicable to trustee fees.

In conclusion, the standard to be applied to trustees is the one cited in *West Coast* and not *Rowe*.

As a take-home message, for those grantors who intend to limit trustee fees, such a provision could be drafted in the trust document. Absent such provision, however, the standard asserted in *West Coast* is applicable.

Protective order requires sufficient grounds to prevent discovery

Kristen N. Toomey, Petitioner, v. The Northern Trust Co., Trustee, etc., et al., Respondents, Case No. 3D15-2813 (3rd DCA, January 2016)

The circuit court granted a protective order that prevented the petitioner from taking the deposition of two elderly witnesses. The petitioner sought a writ of certiorari asking for the order to be quashed. The petitioner prevailed.

In the underlying case, the respondent as trustee of the James L. Knight Charitable Term Trust (dated Mar. 26, 1969) was the plaintiff in a complaint seeking a determination of how the terminating distributions to the great-grandchildren beneficiaries should be made. The petitioner was one of these great-grandchildren. There were four others, three of which had filed a motion to dismiss the complaint.

Before the motion to dismiss was ruled upon, the petitioner sought to take the deposition of two living witnesses who had knowledge about the grantor's intention. The evidence reflected that the two witnesses were ill, or elderly, and that the petitioner sought to preserve their testimony. The other beneficiaries filed a motion for protective order until the motion to dismiss could be ruled upon. The trial court granted the protective order, and this proceeding followed.

The Third District considered whether the trial court order could cause irreparable harm. Additionally the defendants seeking the order had not established that the discovery would cause annoyance, embarrassment, oppression, undue influence or expense, and failed to rebut the need to preserve the testimony. Ultimately, the Third District agreed to quash the protective order, finding that "[t]he attorney's fees and court reporting costs for two videotaped depositions on a discrete set of issues pale in comparison to the prospect that the testimony of two potentially important witnesses may be irrevocably lost."

This case serves as a reminder that when seeking a protective order under Fla. R. Civ. P. 1280, the movant must show sufficient grounds to prevent the discovery.

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Movant has burden of proof when seeking temporary injunction of trust agreement

Betty L. Dowdy, Appellant, v. Michael Dowdy, Interested Person, Appellee, Case No. 2D14-5717 (2nd DCA, January 2016)

This case involves both construction of a trust agreement, and the law applicable to temporary injunctions. The facts revealed a joint revocable living trust in a second marriage. Both grantors had children from prior marriages, and the trust named all as secondary beneficiaries and successor co-trustees of the trust. The husband died first, and the wife subsequently amended the trust, removing the husband's children as beneficiaries and co-trustees.

She then sold the real property that made up the only asset of the trust. One of husband's sons learned of this sale and filed a petition to construe the trust. He argued that the amendment to the trust was invalid because the trust had become irrevocable upon the death of his father. He also asked, and obtained, an order enjoining the appellant to deposit the $100,000 in proceeds from the sale into the court registry. The appeal followed.

Addressing the temporary injunction, the Second District held that the movant had the burden of making four showings: 1) the movant will suffer irreparable harm without it; 2) there is no adequate remedy at law; 3) there is a substantial likelihood of success on the merits; and 4) it would be in furtherance of the public interest, citing *Atomic Tattoos, LLC v. Morgan*, 45 So. 3d. 63, (Fla. 2d. DCA 2010). Finding that he was unlikely to succeed on the merits, the appellate court reversed the injunction.

The court addressed the underlying contention that the trust was irrevocable, citing a term of the trust that provided:

> During the Settlor's lifetime, the Trustees, in the Trustees' sole discretion, may pay, invade or apply the income or corpus, or so much as they may choose, to or for the benefit, support and maintenance of the initial primary beneficiaries, Dennis R. Dowdy and Betty L. Dowdy, or the survivor, and may add to the principal any income not so expended. The judgment of the Trustees, as to propriety and amount of such payment, shall be conclusive.

Rejecting the son's argument that the trust became irrevocable and immune to amendment after his father's death, the appellate court interpreted this provision to mean that widow Betty had unfettered authority to sell the trust property. As such, the Second District concluded that the son's argument could not succeed on the merits, and therefore the conditions for the temporary injunction did not exist.



Diane Zuckerman *is AV rated by Martindale-Hubbell. She received the BS degree in nursing from the University of South Florida and the JD from the University of Florida, Levin College of Law. Her education in nursing and law gives her unique insight into the interface between the two disciplines and helps her to be a knowledgeable practitioner. She is a member of the Elder Law and Real Property, Probate and Trust Law sections of The Florida Bar and the Hillsborough County Bar, and she is active in Kiwanis and the Tampa Bay Estate Planning Council.*

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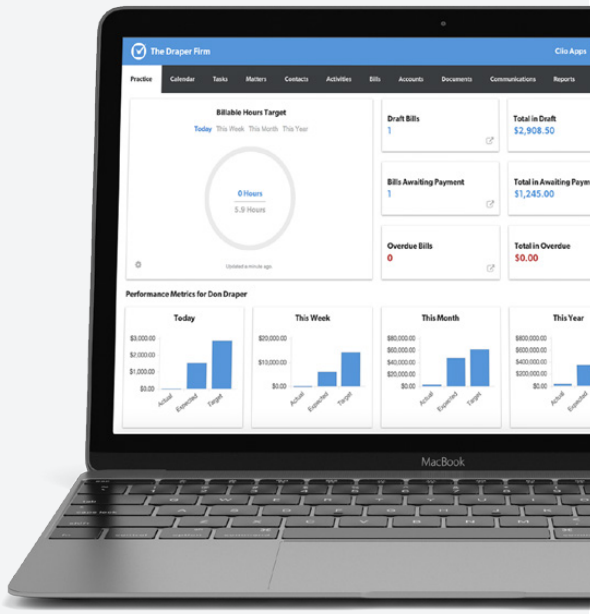
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