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Negotiated rulemaking update: Changes for residents and facilities may be coming soon

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The Elder Law Advocate
Established 1991
A publication of the Elder Law Section of The Florida Bar

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The deadline for the SPRING ISSUE is March 1, 2013. 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 Stephanie M. Villavicencio at svillavicencio@zhlaw.net, or call Arlee Colman at 800/342-8060, ext. 5625, for additional information.

Advertise in The Advocate
The Elder Law Section publishes three issues of The Elder Law Advocate per year. The deadlines are March 1, July 2 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 8½ 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 Arlee Colman at acolman@flabar.org or 850/561-5625.
Get the most out of your membership

A lot has happened since I became chair of the Elder Law Section in June 2012. We created and are beginning to implement a long-range plan. The section is in the process of submitting its formal request to change the section’s name to the Elder and Disability Law Section, as approved by the ELS Executive Council in 2009. The section has revamped its annual certification review course and is holding an annual update. The section held its retreat in Glacier National Park (photos and article later in this issue). We are preparing for a public hearing being held by The Florida Bar on the unlicensed practice of law as it relates to the services used by elderly clients. All this is in addition to the regular work of the section.

As part of the long-range plan, the Executive Council conducted the first-ever Elder Law Section member survey. The member survey was sent via email to every section member in October 2012. The results uncovered some fascinating issues within our membership.

Expect communication from the section’s leadership

The first issue the member survey revealed is that our members do not receive as much information about the section and its committees, events and advocacy as they would like. To resolve this, the section’s leadership has developed a plan to communicate with members regularly through e-blasts. These e-blasts will inform members of benefits available to them, upcoming events, mentoring calls, deadlines, additions to the website, significant committee updates, award application deadlines, the section’s advocacy efforts and committee and leadership vacancies.

To receive these e-blasts, members must have a current email on file with The Florida Bar Elder Law Section. Now is a good time for members to log on to The Florida Bar’s website to update or add a current, working email to their Bar profile. Not only will members stay up-to-date with section matters, but they will also be able to comply with the new rules that require court documents to be served on the parties via email. (A summary of these new rules is available on the members’ only pages of the section’s website.)

Use of the section’s website

The second issue the member survey revealed is the lack of use of the section’s website, www.eldersection.org. Many of our members were unaware of the website or how to access the members’ only areas of the site.

The public portions of the website include a current list of all major section events, contacts for the section’s leadership and contact information for the section’s administrator, Arlee Colman. On the committees page is a list of all section committees, contact information for the committees’ leadership and a schedule of committee meetings throughout the year. Under “Resources,” members can find commonly used websites for elder law attorneys and their clients as well as a list of free CLEs on practice management available through The Florida Bar.

The members only pages of the website include back issues of The Advocate, a list of long-term care partnership resources and a committee page for every substantive and administrative committee of the section. In addition to general committee information, these pages include information, forms and other resources available only to the section’s members.

Over the past few months, Collett Small, our website committee chair, and I have worked hard to update the website, keep it current and solicit feedback from our members about the content they want to see. While the member survey provided some suggestions, we invite members to spend a few minutes touring the site and giving us feedback for improvement.

If members have not yet requested their website login and password, go to www.eldersection.org and, on the home page, click on the “request a username and password” link in the middle column under “Members Area.”

Participate in the section’s advocacy, education and substantive work

A third issue raised by the member survey was the lack of knowledge members have about the significant advocacy, education efforts and substantive work the section does throughout the year. Not only do section members volunteer their time, knowledge and expertise to produce some of the highest quality CLEs available through The Florida Bar, they also spend a great deal of effort advocating for and educating elder law attorneys and clients.

The section has several substantive committees, each of which is assigned a topic of law within elder law. Those committees meet regularly to review and analyze current issues in a particular area, produce educational materials for committee members and the general member-
Message from the chair
from preceding page

ship and create plans to disseminate that information.

Throughout the year, these committees review and update the section’s legislative positions and review and advocate for or against proposed legislation in accordance with the adopted positions. The committees also review and analyze changes in administrative rules, caselaw and statutes at the federal and state levels. When significant changes are made, the committee charged with monitoring an affected area develops a plan to inform members of changes and to advocate for or against proposed changes.

In addition to these tasks, the committees work with organizations throughout the Bar and the state to educate consumers, do pro bono work and educate state agency personnel and law enforcement on various issues specific to elder law. Committee representatives are also required to attend executive council meetings, provide reports to The Florida Bar, submit materials for CLEs, find mentors for the section’s mentoring calls, contribute articles to The Advocate and provide updates and resources for the section’s website.

The committees are always looking for volunteers. There is no requirement that members be “experts” in any particular area to join the corresponding substantive committee, only that they are willing to participate, ask questions and work together with other committee members to produce the best possible work product they can. Expertise will come with participation.

To maintain the high quality of education and advocacy, our committees need everyone to be involved. To join a committee, simply go to the section’s website, www.eldersection.org, review the committees listed on the committees’ page and find one that interests you. To see what the committee has done in the past year, log on to the members’ only area of the website and review past issues of The Advocate, where all committees publish periodic reports on projects. Email the committee chair and let him or her know you would like to volunteer and want to join the next meeting. If members have any difficulty joining a committee, they can contact me and I will connect them with the committee chair.

Get on the section’s leadership track

The member survey also revealed that many members are unaware of how to become involved in section matters and get on what might be called the “section leadership track.” While the section has no formal “leadership track,” we are always searching for new talent and asking members to join committees and take on leadership roles. Members of the section are encouraged to become as

<table>
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<tr>
<th>COMMIT 10 HOURS THIS YEAR TO THE ELDER LAW SECTION!</th>
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<tr>
<td><strong>COMMIT 10 HOURS</strong> yearly to the ELS</td>
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<tr>
<td>(less than one hour per month!)</td>
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<tr>
<td>Work on a project for a committee</td>
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<td>Attend a section CLE in person</td>
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<td>Write an article for The Advocate</td>
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<tr>
<td>Participate in all the mentoring calls throughout the year</td>
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<th>What you GAIN:</th>
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<tr>
<td>Personal and professional growth</td>
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<tr>
<td>Visibility as a “go-to” member in the section</td>
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<tr>
<td>Shared knowledge of other experts</td>
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<td>Publishing credit</td>
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<td>Leadership positions within the section</td>
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<td>Advance knowledge of changes in the law</td>
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<td>Visibility as a cutting edge attorney in your community</td>
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<td>A voice in the section’s administration and advocacy</td>
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<td>Access to information available only to committee members</td>
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Leadership positions within the section

- Advance knowledge of proposed changes in statutes and rules
- Leadership positions within the section
- Advance knowledge of changes in the law
- Visibility as a cutting edge attorney in your community
- Access to information available only to committee members
involved as they want and to move as far up the “leadership track” as they wish, whether that means becoming a committee chair or the section chair. To get started on the “leadership track,” use the section’s 10 Hour Rule. This year, the section is encouraging all members to commit to spending 10 hours involved with section matters. This can mean attending a section CLE, participating in all the free mentoring calls throughout the year, attending all the committee meetings for a committee, writing an article for The Advocate or volunteering to complete a portion of a project for a committee. Once a member becomes a part of the process, it is hard to deny the benefits that actively participating members receive.

The more a member becomes involved, the more the member gets to know about the section and the more the section gets to know him or her. The member develops expertise and becomes a recognized presence in section matters. As members participate, they are asked to do more, including serving as committee chairs and liaisons or heading up advocacy projects. In time, if the member wishes, he or she will be asked to take on more leadership roles within the section’s administration.

Admittedly, this process takes time. Many of us spend years involved in section matters before becoming section leaders. I was active with the section for more than 10 years before becoming section chair in June. And had I never become a section leader, the benefits still outweigh the time I spent. I was mentored and befriended by six past chairs, as well as by innumerable experts throughout the section, and participated in countless projects and advocacy campaigns that have changed the landscape of Florida elder law. If you hesitate to get involved or think there isn’t a place for you in our section’s activities, I invite you to call me. Together we will find a place where you are needed.

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Message from the chair-elect:
Interesting times …

John S. Clardy III

My deadline for this message fell before the Mayan calendar ended Dec. 21, 2012. Since you are reading this, we can now look ahead to the many challenges and opportunities that we elder law attorneys and our clients will face in the coming year.

I look forward to continuing to serve the Elder Law Section. My involvement in the section has greatly increased my knowledge and proficiency in the practice of elder law. But working with and getting to know the other elder law attorneys who are actively involved in the section has been the best reward.

As the old Chinese curse goes, “May you live in interesting times.” Well, we certainly do. On the elder law front, 2013 will not be boring. Issues ranging from Medicaid managed care and the impacts of the Affordable Care Act on Florida’s health care system to legislative proposals stemming from entitlement reform and the ever-tightening state and federal budgets will be front and center.

To keep up with these changes, the year begins with the section’s three-day CLE, Essentials of Elder Law and the Elder Law Annual Update and Review Course, in Orlando. Your section is working hard to provide you with comprehensive programs on timely topics with up-to-date information.

Also coming in the first half of the year will be mandatory e-filing. Just as we are getting the hang of e-service, another change to our everyday practice looms. As the details of this process are finalized, the section will update members, especially as it affects the guardianship and probate practice areas.

A major concern of many elder law attorneys is the pending transition of Florida’s $21 billion Medicaid program to for-profit managed care organizations. As advocates for the elderly and the disabled, our skills and efforts are needed more than ever. There are many unanswered questions, and the section will continue to make the voices of elder law attorneys and their clients heard.

Other questions we likely will face this year: How will the Affordable Care Act affect our practice? What changes are in store for the elderly and those with special needs as the Medicare, Medicaid and VA programs are reformed on the federal level? How will Florida protect its most frail and vulnerable residents?

However these questions get answered, the Elder Law Section will continue to be there for its members and the clients they serve. But the section is only as strong as there are members willing to step up and support the section. I encourage you to become involved in the section’s committees on the issues that matter to you most. This year will provide many opportunities for you to serve the section and to promote the practice of elder law.

Interesting times, indeed.
Health Care Reform:
Legal and Ethical Questions About Where We Go From Here

February 4, 2013 • 8:15 a.m. – 4:30 p.m.
FSU Alumni Center • Tallahassee, Fla.

On June 28, 2012, the Supreme Court of the United States held in National Federation of Independent Business v. Sebelius that the 2010 Patient Protection and Affordable Care Act is a constitutionally valid exercise of Congress’s taxing and spending power. This holding, rather than definitively settling all issues pertaining to health care financing and delivery in the United States, instead raises or leaves open a wide variety of still controversial legal, ethical, financial, political and organizational questions about the future of health care in this country.

Expert and experienced speakers representing an array of disciplines and perspectives will help the audience identify and grapple with the most important legal and ethical challenges awaiting them as American society seeks to implement the PPACA or alternatives to it.

Accreditation
The Medical Educational Council of Pensacola designates this live activity for a maximum of six (6) AMA PRA Category 1 Credits TM. Physicians should only claim credit commensurate with the extent of their participation in the activity.

Applications for six credit hours have been submitted for attorneys (including ethics), nurses, social workers, psychologists and medical librarians.

Course Tuition
Tuition is free but registration is still required for Florida Bioethics Network members. All other professionals register by Jan. 25, 2013, for $60 or after Jan. 25 for $80. Registration on the date of the conference will be $90. FSU College of Medicine and College of Law students may attend for free, but please register by Jan. 25. After Jan. 30, registration will be accepted only if space is available and will not include lunch.

For further information or a registration brochure, email Julie Jordan at julie.jordan@med.fsu.edu or call 850/645-9473.
“Within 5 days after a petition for determination of incapacity has been filed, the court shall appoint an examining committee consisting of three members.”1 Each member of the examining committee must submit a report within 15 days of appointment.2 The examining committee reports are statutorily required, and a copy "must be served on the petitioner and on the attorney for the alleged incapacitated person within 3 days after the report is filed and at least 5 days before the hearing on the petition."3 An essential, but not necessarily exclusive, element used in making a decision concerning capacity is the written results of the comprehensive examination required to be conducted by each of the committee members.4 This leaves no doubt that the statutorily required examination committee members’ reports are material to the factual determination of capacity. However, this is not sufficient, without the live testimony of the examining members, to overrule a hearsay objection to the admission of the examining committee members’ reports.5

In the case of Shen v. Parkes, 37 Fla. L. Weekly D2559a (Fla. 4th DCA 2012), a plenary guardianship was sought over Shen. During the adjudicatory hearing on the petition to determine capacity, Shen asserted a hearsay objection to the admission of the examining committee members’ reports over a hearsay objection. The Records of Regularly Conducted Business Activity exception to the hearsay rule requires that evidence in the form of an opinion or a diagnosis be proffered through direct testimony of the person whose opinion is being admitted into evidence.6 The Public Records and Reports hearsay exception provides for admission of reports on “… matters observed pursuant to duty imposed by law as to matters which there was a duty to report … .”7 It would seem this exception provides for the admission of court-approved committee members’ reports. However, in Lee v. Dep’t. of Health and Rehabilitative Services, 698 So.2d 1194 (Fla. 1997), the Florida Supreme Court held that in applying the Public Records and Report hearsay exception, reports containing evaluations by public officials, without the direct testimony of a witness with personal knowledge of the facts, are inadmissible hearsay.8

The filing of a statutorily required report does not place the report in evidence.9 This is because “[e]ven when hearsay can be considered over objection, hearsay … is not deemed competent, substantial evidence sufficient to support a factual finding.”10 In order for the report to be admitted into evidence, Florida law requires direct testimony from the person whose opinion or diagnosis is recorded and who has actual knowledge of the facts.

Endnotes:
1 §744.331(3)(a), Fla. Stat.
2 Id. (d).
3 Id. (h).
4 Id. (f).
5 Shen v. Parkes, 37 Fla. L. Weekly D2559a (Fla. 4th DCA 2012).
6 Id.
7 Id.
8 §90.803(6)(a), Fla. Stat.
9 §90.803(8), Fla. Stat.
10 §90.803(6)(b), Fla. Stat.
11 §90.803(8), Fla. Stat.
12 Arce v. The Wackenhut Corp., 40 So.3d 812 (Fla. 2010).
13 Searinge v. Herrick, 711 So. 2d 204 (Fla. 2d DCA 1998).
14 G.T. v. Dep’t of Children & Family Services, 935 So. 2d 1245 (Fla. 1st DCA 2006).
Guardianship Committee

Sponsored by Wells Fargo
Carolyn Landon and Melissa Barnhardt, co-chairs

The Guardianship Committee met in September and discussed the status of the Right to Bear Arms legislation that was approved by the Executive Council of the Elder Law Section. The legislation has been submitted to The Florida Bar and is being sent to other sections for comment. The committee also discussed the RPPTL Section’s ad hoc committee that has been charged with a two-year project to look at overhauling the guardianship statutes. Enrique Zamora and Charlie Robinson are representing the ELS on the ad hoc committee. Finally, the Guardianship Committee discussed the recent case that upheld the requirement of a dismissal of a petition to determine incapacity if the majority of reports do not find incapacity. The RPPTL Section took the position that it would propose a legislative change to make the dismissal mandatory if the reports are unanimous. The Guardianship Committee agreed that the ELS would not take a different position on the issue, but instead created a subcommittee to analyze the examining committee reports further and to propose changes to make them more comprehensive if needed.

Residents’ Rights Committee

Laurie E. Ohall and Aubrey Posey, co-chairs

The Residents’ Rights Committee has been working on compiling a list of issues regarding assisted living facilities that lack legislation. Our goal is to propose legislation to address these issues, some of which were identified and detailed by The Miami Herald’s “Neglected to Death” series published in spring/summer 2011.

The committee meets once a month via telephone conference on the second Thursday of the month at 4 p.m., and we welcome any new members or guests who wish to participate. Dial 888/376-5050 and enter PIN 8484257103#. You will be put on hold until the chair joins the call.

Please feel free to email the co-chairs, Laurie E. Ohall (lohall@ohalllaw.com) and Aubrey Posey (aubreyposey@hotmail.com), if you have any questions or would like to join the committee.

Rules Change Liaison
Heather Boyer Samuels

New Rules
Revised Opinions – SC11-399 and SC10-2101 (Revised Opinions, Oct. 18, 2012)

These revised opinions continue the Supreme Court’s efforts to address e-filing and email service, and although they do not make any substantial changes, they are of note to elder law practitioners because they further define the parties that are subject to the new requirements, provide additional instruction to the clerks and continue to revamp the rules to conform to the new electronic filing systems and procedures. The new rules, effective Dec. 1, 2012, also redefine the official court file as the electronic file and have a solution to the issue of what happens to wills and codicils filed with the court.

The e-filing portal still does NOT serve other parties. You must serve other parties in accordance with the email service rules.

Rules of Judicial Administration 2.520 (Documents) and 2.525 (Electronic Filing)

This section has been changed to clarify and set out the clerk’s role in converting documents filed in paper form to electronic format, and to set forth specific guidelines for electronic filing to be observed by the clerks.

The court lists the exceptions for documents that are permitted to be filed in “non-electronic” format (such as documents filed in open court, those filed by governmental or public agencies and those filed by self-represented litigants); however, even those are to be converted to electronic documents by the clerk.

This section does away with the requirement that any document electronically filed must also be paper filed. In addition, if a party permitted to paper file a document that can be electronically captured sends it in with a stamped, self-addressed envelope, the clerk can return that paper original to the party. If not, after the document is electronically captured, the clerk is permitted to recycle it.

Rules of Judicial Administration 2.516 (Service of Pleadings and Documents)

This is the rule that provides that all documents required or permitted to be served on another party must be served by email, with few exceptions. Those who are not represented by an attorney may designate an email address for service if they wish; however, pro se litigants are not required to use email service. Documents served by formal notice or required to be served in the manner provided for service of formal notice are not required to comply with rule 2.516.

Email service has been mandatory as of Sept. 1, 2012, in civil, probate, small claims, family law and appellate divisions.

Email service requirements as apply in proceedings according to the Florida Mental Health Act (Baker Act) will not be mandatory until Oct. 1, 2013.

Florida Probate New Rule 5.043 (Deposit of Wills and Codicils)

This new rule provides that “any original, executed will or codicil that is deposited with the clerk must be
retained by the clerk in its original form for twenty years, regardless of whether the will or codicil was 'permanently recorded' under amended Rule of Judicial Administration 2.430.”

The practical effect of this seems to be that even though the will or codicil will be electronically maintained, it will also be maintained in paper format for 20 years by the clerk, NOT by the lawyers, as had been contemplated.

Updated deadline for e-filing

These new electronic filing requirements will become effective in the civil, probate, small claims and family law divisions of the trial courts and appeals in these cases on Apr. 1, 2013, pursuant to RJA 2.525.

New e-filing requirements as apply in proceedings according to the Florida Mental Health Act (Baker Act) will not be mandatory until Oct. 1, 2013.

Please note that those parties excused from e-filing under amended RJA 2.525(d) and attorneys excused from email service under RJA 2.516 are not required to file electronically, although they are permitted to do so.

Pending Rules

Proposed Ethics Advisory Opinion 12-2

The Professional Ethics Committee is taking comments on a Proposed Ethics Advisory Opinion regarding “whether lawyers may permit supervised nonlawyers to use the lawyer’s access credentials for filing documents with a court using the E-Portal.” The conclusion of the proposed opinion is that staff may use the lawyer’s credentials to e-file since it is a lawyer’s responsibility to supervise his or her staff. The certification to documents proposed by the Florida Courts Technology Commission states that a document to be e-filed utilizing the portal contains a statement or a required check box that the attorney filing or directing filing of the documents certifies that it does not contain confidential information protected by the RJA.

The full text of the proposed opinion is available on The Florida Bar’s website.

Mark your calendar!

**JANUARY 18-19, 2013**

Elder Law Annual Update and Review
Reunion Resort, Orlando

**FEBRUARY 4, 2013**

8:15 a.m. – 4:30 p.m.
Health Care Reform:
Legal and Ethical Questions About Where We Go From Here
FSU Alumni Center, Tallahassee

**APRIL 17-19, 2013**

Teaming Up Against Elder
Financial Exploitation
Florida Crime Prevention Training
Institute & The Florida Bar’s Elder Law Section Committee on
Elder Abuse, Neglect & Exploitation
Embassy Suites Orlando North
Altamonte Springs

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Or download an application from The Florida Bar’s web site at www.FloridaBar.org.
Committees keep you current on practice issues  
Contact the committee chairs to join one (or more) today!

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

Committee membership varies from experienced practitioners to novices. There is no limitation on membership, and members can join simply by contacting the committee chair or the section chair. Be sure to check the section’s website at www.eldersection.org for continued updates and developments.

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Law office management: Going paperless

The proper management of clients’ information, records, pleadings and related documents is the cornerstone of every legal practice. In the age of digital storage and data management software, many practitioners are wondering whether going “paperless” is the right choice for their business. In an effort to understand the many queries that arise when considering how and when to turn to digitized document storage, the following questions have been posed to some elder law practitioners who have firsthand experience with the transition:

When should an office decide to become paperless, and how long should it take to transition fully?

The decision to transition to a paperless office is different for everyone. In 2011, we decided to start conserving physical space within our office and began with scanning files retroactively. On Jan. 1, 2012, our office policy was to have fully scanned digital copies for all files moving forward. However, because some of the attorneys in our firm preferred hard documents, oftentimes a physical file was kept until termination of the case. Nevertheless, I always retain an original hard copy of estate planning documents that I’ve drafted for clients.

Our office went paperless because our county had instituted a requirement of e-filing and e-service. Other counties were also setting deadlines for the same requirements. We anticipated that our office would eventually have to be completely digitized. It took approximately two years to transition to a fully paperless office, including retroactive files. There are some documents that we didn’t shred, such as original estate planning documents and original deeds.

How has your work productivity changed? Can you quantify the cost versus the benefit?

I’m not sure whether productivity has changed much. Although looking for documents that we’ve previously scanned is a bit easier, it can take longer if a document wasn’t properly scanned. The margin of error in my office is higher for files that were scanned prior to Jan. 1, 2012, because these files were scanned in bulk. They were not properly separated into segments such as pleadings or correspondence. Now we’ve learned how to organize and manage our documents.

The time spent by myself and my staff was reduced from five hours to nearly one hour of work. We saved time and money. All of our files are at our fingertips—we no longer need to shuffle through papers or volumes of files. However, with any large change in an office setting, this process has been one of trial and error.

Have you discovered any disadvantages?

Certainly. If a document is incorrectly scanned and then shredded, you have to recreate the document. The greater difficulty lies where the document is from a third party. It’s embarrassing to ask them to recreate or resend the document that you received. Unfortunately, I’ve also found that it’s easier to send the wrong documents to a certain party. For example, email addresses get confused, and mistakes are more probable using a paperless system. Documents can be mislabeled as a notice or correspondence when they may be something different.

I don’t think the cost has really changed. I can be more efficient in that I can work remotely from home or elsewhere. Also, if the court in your county is not currently up-to-date with paperless filings, you may need a physical copy for hearings.

What methods did you employ when you decided to go paperless?

We trained our office to be prepared for a six-month probationary period in which we were going to become entirely paperless. Several tutorials were given to educate the support staff on the proper methods and time-saver tools. In addition, email reminders were given so that when the starting date arrived, everyone would be ready and in compliance with our new policy. Every individual was given a unique task. For example, incoming mail would come to our receptionist, and she or he was responsible for scanning the items into the system.

We don’t employ software for our organization. Our office is fairly small in size, and we don’t need an additional program outside of our personal computer system. I believe that the choice of how to organize documents depends on the size of the office.

We employed a new program, much like many law office management software programs, that controls billing, forms, correspondence, contacts, office management, client information, vendors and pleadings. This effectively eliminated any other office management program that we used. We also employ a disposal service company to assist us with shredding and disposing our documents.

We have a business that picks up our scanned documents and shreds them for a monthly flat rate based on the average volume of our load.

What are some tips you can give other practitioners who are interested in having a paperless office?

You need to plan and prepare your...
staff members to use the software, scanners and shredders, and to save documents. They need to be familiar with the software or method of digitizing a document. You may find it necessary to purchase software for document management to optimize your time. Many programs can also detect anyone who misuses your e-documents by keeping track of the work completed on a file and who in the office works on a particular case.

**Does the size of a law office affect your decision to go paperless?**

Yes. An office must research methods or programs that can assist in that particular office’s needs. Some offices may not find it advantageous to go paperless.

I believe that medium to large firms will mostly benefit, but small offices can also increase productivity in going paperless. However, size shouldn’t matter when considering the future requirements of e-service and e-filing.

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**The ABCs of elder law**

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Two out of three reports and you’re out—
But should you be?
A revisit of §744.331(4)

by Enrique Zamora

In 2003, the Florida Legislature created a Guardianship Task Force to examine guardianship and incapacity and to recommend specific statutory changes. I was appointed to represent the Elder Law Section as a member of the task force. During the next two years, the task force convened throughout the state to elicit testimony from the public on guardianship issues and how the process could be improved.

It was during those two years that I came up with what I thought at the time was a good idea. I considered the legislative intent of Chapter 744: “to make available the least restrictive alternative form of guardianship” and “that adjudicating a person incapacitated deprives such person of all of his or her civil and legal rights. Such deprivation may be unnecessary” (emphasis added). Therefore, I believed the task force should make every effort to avoid said deprivation of civil and legal rights whenever possible. I thought if two members of the examining committee opined that the alleged incapacitated person (AIP) did not need a guardianship, then the petition should be dismissed. The idea was presented to the task force, and it was recommended as one of several statutory changes in the final report. The rest, as they say, is history. Section 744.331(4) was born and titled Dismissal of Petition. This section provides that if a majority (i.e., two out of three) of the examining committee members concludes that the AIP is not incapacitated in any respect, the court shall dismiss the petition (emphasis added).

It has been argued that this section deprives the judge of his or her ability to determine the capacity or lack thereof of an AIP by directing the judge to dismiss the petition to determine incapacity without considering all the evidence available. The reality is that by requiring the judge to dismiss the petition, this section runs afoul of 744.331(3)(f), which states “the comprehensive report should be an essential element, but not necessarily the only element in making a capacity and guardianship decision” (emphasis added). I submit that by requiring a judge to dismiss a petition to determine incapacity based solely on the report of two members of the examining committee, it creates a situation where the judge must use said reports as the only evidence in making a capacity decision.

One must recall that the standard of evidence required for a finding of incapacity must be clear and convincing. Is the opinion of two members of the examining committee stating that the AIP is not incapacitated in any respect enough to rise to the level of clear and convincing? The clear and convincing answer is: perhaps!

Let’s turn to caselaw for some guidance. Unfortunately, the amount of caselaw on this subject is not abundant. I found three cases where this particular statute was discussed, and they were all decided after the statute was enacted. The most recent decision comes from the Fourth District Court of Appeal. The Honorable Judge Mark Speiser of the 17th Judicial Circuit was reversed when he ruled that the requirement to dismiss a petition to determine incapacity based on two reports of the examining committee members was unconstitutional because “as worded [it] results in the abdication of judicial authority to the individuals of the examining committee, and it removes the right of the court to make appropriate decisions for the benefit of the alleged incapacitated person.” The district court of appeal did not agree with Judge Speiser’s ruling and decided the statute is clear on its face. Once two members of the examining committee report there is no incapacity, the dismissal of the petition is a ministerial act.

Let’s assume the AIP is having a “lucid moment” when he or she is being examined by one or more of the examining committee members. It is well settled law that, at that moment, the AIP could have executed a valid will, assuming all other requirements are met, but does it mean he or she has capacity? Incapacity is not necessarily a full-time condition. Assume that the examining committee member(s) did not conduct the examination in accordance with the requirements of Chapter 744. Should the petitioner be allowed to challenge the reports of the examining committee? There is at least one case that indicates the report cannot be challenged. However, a motion to strike the report could constitute the appropriate remedy.

It appears from the plain language of the statute that once the two reports recommend against having a guardianship, the judge must dismiss the petition, no challenges allowed; at least two cases in two different district courts of appeal have so ruled. Did the Guardianship Task Force consider the possibility of challenging the reports once they were filed? I was there, and I don’t remember there being any such discussions.

In light of these findings, I find I can easily embark on a detailed discussion of what constitutes clear
Two out of three
from preceding page

and convincing evidence. I could also discuss due process as it relates to the AIP. However, I limit this discussion to the following: If the position is taken that the report of two examining committee members recommending no guardianship constitutes clear and convincing evidence of the capacity of the AIP, then, as previously stated, the reports become the only element in deciding the case. I submit that this argument is in direct conflict with the requirement of §744.331(3)(f).

With arrival of the year 2013, a new task force has been convened by the Real Property, Probate and Trust Law Section of The Florida Bar to review and revise Chapter 744. Once again, I am a member of the task force representing the Elder Law Section, and perhaps the time has come to revisit the rule.

Enrique Zamora is a partner with the firm of Zamora & Hillman, with offices in Coconut Grove. His practice focuses in elder law with an emphasis in the areas of probate administration and litigation, guardianship administration and litigation, trusts administration and litigation and estate planning. He is an adjunct professor at St. Thomas University School of Law, where he teaches elder law.

Endnotes:
3 Rothman v. Rothman, 93 So. 3d 1052 (Fla. 4th DCA 2012).
6 Rothman, 93 so. 3d at 1053 (discussing and referring to the trial court’s finding of unconstitutionality).
7 Levine v. Levine, 4 So. 3d 730 (Fla. 4th DCA 2009).
Marmots and glaciers and bears, oh my!
by Twyla Sketchley

From Aug. 7, 2012, through Aug. 13, 2012, the Elder Law Section held its annual retreat in Glacier National Park in Montana. Section members and their families traveled to Big Sky Country to learn a little about elder law and a lot about one of our nation’s treasures. CLEs were a combination of recorded programs that participants listened to while traveling to and from Montana and in the evening in the absence of television and internet in retreat rooms. Live CLE sessions were held outdoors in the crisp morning air, with hot coffee in abundance.

The retreat began on the western side of Glacier Park on the banks of Lake McDonald. On the first morning, Emma and Jay Hemness hosted a safety demonstration where participants learned how to avoid encounters with bears and other cute, albeit wild, animals that enjoy tasting salty tourists. Participants learned the importance of pepper spray and how to use it, when to run from a bear, how to assume a fetal position during a bear attack and what to do if a member of the group is injured while hiking.

While staying at Lake McDonald, participants discussed professionalism and diversity in elder law, stress and practice management and the right to die issue in Montana. Several attendees organized a yoga class on the shore of Lake McDonald. After morning CLEs, groups explored Glacier National Park by car, by bus or on foot. Several members took the historic Red Bus Tour, an open air tour on the oldest tour buses in the United States. Others hiked to amazing spots like Hidden Lake just over the Continental Divide, Avalanche Lake, Grinnell Glacier Overlook and the Garden Wall.

On Aug. 10, the Retreat Cookout was held at Glacier Resort, where everyone ate steak, the children swam in the resort’s pool and participants hiked a short distance to the resort’s waterfall. After the cookout, participants drove around the edge of the park across Marias Pass on the Continental Divide to Many Glacier on the eastern side of Glacier National Park.

One of the most stunning manmade features of Glacier National Park is Many Glacier Lodge located on the shore of Swift Current Lake. The lodge was built to withstand driving winds and approximately 300 feet of snow each winter. The lodge is home to a photo exhibit showcasing the glaciers over the past 60 to 70 years. Based on amateur and professional photos of the world famous glaciers in Glacier National Park, it is anticipated that all the glaciers will be gone in the next 8 to 10 years.

After CLEs on creating pet trusts and hiring and firing employees, many participants and their families went on hikes and boat rides to explore the eastern side of the park. While at Many Glacier, several participants hiked to Iceberg Lake. Iceberg Lake is a nearly freezing lake sitting in a “bowl” created by centuries of glaciers moving down the mountains. The lake holds massive chunks of ice and provides a stunning view for an afternoon picnic. Some of the braver participants even went for a “polar bear” dip in the lake.

Across the United States/Canadian border is Glacier National Park’s Canadian sister park, Waterton Park. Retreat attendees took an organized trip to Waterton Park Canada. While in Waterton, attendees spent the day hiking to Goat Haunt. One of the more interesting parts of the day was the lessons some attendees learned about the rigorous interrogations necessary to cross the border back into the United States.

On the last night, the children who attended the retreat made s’mores and talked about their experiences. A couple commented on the beauty of the surroundings and the bear sightings. Others laughed about how funny their parents were as they groaned and moaned every time they got out of their chairs. All said they had a great time, even though they had spent six days without cell phone service or the ability to text.

While all attendees saw bears and other wildlife, some had closer encounters than others. One of the most

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Section Retreat
Glacier National Park
Montana
August 7 - 14, 2012

Retreat attendees enjoy a picnic on the shore of Iceberg Lake.

Pictured are all retreat attendees and their families, except Jay Hemness, who graciously volunteered to take the photo.

Close encounters of the grizzly kind

Moose bathing

A grizzly bear keeps an eye on retreat attendees.

Three-year-old Vonn Draper leads Twyla Sketchley, ELS chair, and other attendees back to camp from Iceberg Lake.

Christopher Burdick on top of the Continental Divide above Hidden Lake.
Above: Nick Weilhammer tries “iceberg surfing” in Iceberg Lake. (Photo by Twyla Sketchley)

Left: John Clardy holds the board certification flag while iceberg surfing in Iceberg Lake.

Unless otherwise noted, photos are by Pamela Burdick, Nick Weilhammer or Emma Hemness

Florida Bar board certified attorneys gather for a photo during a cookout at the Elder Law Section Retreat at Glacier National Park in Montana (l-r: Steve Kotler, Peggy Hoyt, Ailish O’Connor, Emma Hemness, Travis Finchum, Twyla Sketchley, Jill Burzynski and John Clardy).

Jay Hemness and Christopher Burdick take a “polar bear” swim in Iceberg Lake.
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memorable bear sightings was the mother grizzly bear with three cubs that roamed around Many Glacier Lodge and Swift Current Motor Inn, where the attendees stayed. Due to the harsh climate, scarcity of food and competition from other bears, it is rare to see a mother with three surviving cubs.

At the Chair’s Breakfast on the final morning of the retreat, attendees shared their favorite moments of the trip:

Carol Martin, who flew in from Illinois, enjoyed a side trip she took with the section chair to Hungry Horse Dam, but said her favorite moment was seeing a baby bear walking along the road.

Jill Burzynski, chair of the section’s Financial Products Committee, said her favorite part of the trip was canoeing on Lake McDonald in a red canoe.

Jay Hemness, who carried 3-year-old Vonn Draper on part of the Goat Haunt hike, said that was his favorite moment because Vonn wanted to help the “sick” trees. The sick trees Vonn referred to were the snags that remained from a past forest fire.

Peggy Hoyt laughed as she recounted her favorite part of the trip: The first ferry from Goat Haunt leaving Emma Hemness as she tried to stop it fearing she would be left behind, not realizing there was another ferry a few minutes later. Peggy politely waved at Emma as the ferry pulled away. (Needless to say, this was not Emma’s favorite moment.)

John Clardy, chair-elect of the section, said the retreat was one of his favorite section events because it was not only attended by section members, but also by spouses, parents and children, making the trip a family affair and one that families could recreate in 25 years.

Nick Weilhammer, whose hobby is photography, said his trek to Grinnell Glacier Overlook was breathtaking, and given that Grinnell Glacier will likely disappear in the next decade, it was worth the hard, day-long hike.

My favorite part of the trip was watching tired hikers like me in Many Glacier struggling to get up after sitting for an hour to eat dinner.

The trip was also special because attendees shared local craft-brewed beer they discovered in the surrounding communities as they traveled to the retreat, shared photographs of their adventures each morning and in the evening gathered to recount the adventures of the day. It was an opportunity for members to get to know one another and to get to know families. The combination of natural beauty, unique educational format, family-friendly atmosphere and adventure made this a once-in-a-lifetime experience that will go down as one of the section’s most unique events.
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Following last year’s series “Neglected to Death” by the *The Miami Herald* detailing abuses and regulatory failures in Florida’s assisted living facilities (ALFs), Gov. Rick Scott and the Legislature promised reform. The 2012 legislative session ended without any agreement on changes to statutes regulating ALFs. Governor Scott agreed to extend the ALF Workgroup, and the Department of Elder Affairs, in consultation with the Agency for Health Care Administration, the Department of Children and Families and the Department of Health, entered into negotiated rulemaking.

The Assisted Living Facility Negotiated Rulemaking Committee, composed of governmental agency representatives and providers, was tasked with reviewing existing rules in Chapter 58A-5, Florida Administrative Code, and “suggesting changes to ensure safe, quality service and care for residents of assisted living facilities.” It met throughout the summer, issuing a final report on Aug. 14, 2012. According to the committee’s final summary report, “[It] had to keep in mind that although safety and security are paramount, overly burdensome regulations could serve as a barrier to potential providers or drive current providers out of the market. It is important to have a variety of options to make aging-in-place available to Floridians.”

Based on this goal, the recommendations from the committee primarily addressed additional training requirements for administrators and managers, increasing the CORE training requirement to 56 hours rather than the currently required 26 hours, adding additional topics to the curriculum and increasing continuing education requirements to 18 hours every two years. Although the committee considered increasing the required 75 percent competency score on the test that administrators take following completion of CORE training, it did not recommend any increase.

Because many of the concerns raised in “Neglected to Death” focused on ALFs’ failures to address the needs of their residents with mental health issues, the committee proposed several changes impacting ALFs with limited mental health licenses, including requiring an ALF to document all efforts it takes to avoid an involuntary mental health examination under Chapter 393, Florida Statutes, and requiring a facility to ensure that all residents requiring services are referred for appropriate community services. A resident’s refusal of services would require written documentation, and staff members required to complete limited mental health training would be required to take a competency exam and earn a 75 percent score to pass. Currently no examination is required.

Because the committee was constrained by existing statutes, it recommended certain statutory changes, such as specifically requiring facilities to obtain a limited mental health license before admitting any residents classified as limited mental health residents. It also recommended that statutes be amended to require ALF administrators to be licensed or credentialed, as nursing home administrators are.

The Department of Elder Affairs was expected to publish a Notice of Proposed Rules in mid-October for hearings to be held in November and December; however, as of Nov. 1, nothing had been published in the Florida Administrative Weekly. Following the publication of the Notice of Proposed Rules, hearings will be scheduled where public comment may be made. Until then, the status quo remains. No changes have been made to laws and regulations to address the issues outlined in “Neglected to Death.”

Endnotes:
3 See Sect. 429.075, Fla. Stat. (2012) (requiring that staff members with direct contact with mental health residents complete the training requirements within six months of obtaining a LMH license).
Tax tips for elder lawyers

Revoking a Form 56 - Notice of fiduciary relationship

A couple of months ago, a question was posed on the elder law listserv about revoking a Form 56 filing. It was an interesting question and one that I had not even thought of when I wrote the Form 56 article in the tax tips column of The Elder Law Advocate, Vol. XIX, No. 2, Summer 2011. I posed this question to an IRS senior stakeholder representative (interesting title, I know). Her response:

I found some additional information on the matter of terminating a fiduciary relationship using Form 56. IRS is aware of the discrepancy regarding not having a box on the form for terminating Form 56 and is working with counsel to resolve it. Apparently neither the IRS Code nor regulations mention termination. Currently the fiduciaries are either using an old Form 56 to terminate or are just writing “terminate” across a copy of the original form and providing a current signature and date, or are writing a letter to request the relationship be terminated. Revised instructions should clarify the process when they are published. I hope this helps. I am sorry there is not a better solution at this time.

So, the matter is not resolved, but the IRS is working on it. If anyone encounters any difficulties with how the IRS handles your attempt to revoke the Form 56, please let me know and I will pass it along.

Some common IRS misconceptions

Recently I read an internet blog regarding the IRS that very simply addressed items that, while obvious to tax attorneys, are often not obvious to other attorneys, accountants and their clients. I have modified it and hope it is helpful.

- A revenue officer (RO) collects unpaid taxes. A revenue agent (RA) audits. There are other IRS employees that do similar tasks, but these are the two main ones. When your clients say they have received an IRS communication, find out the sender’s title.
- An RO’s badge is a card. ROs do not carry a gun, and they cannot arrest you. They can refer you to criminal investigation.
- If an IRS representative does show up with a badge, he or she is an IRS special agent. These agents are federal cops with guns and arrest powers. Far too often the client (or the attorney/accountant) unknowingly talks him or herself (or the client) into jail by saying too much or the wrong thing.
- ROs have significant power, but it is not unlimited. They are not evaluated on how much they collect, but on how they close cases. Generally speaking, they initially try to contact the taxpayer in person, which can be a real shock to the client.
- ROs (and RAs) can be reasonable and even friendly. Unfortunately, this may cause taxpayers to cooperate so much that they make it worse for themselves.
- The IRS does not email taxpayers. There are occasional exceptions during, for example, an ongoing tax matter for which other contact has been well established. If your client receives an email from the “IRS,” it is virtually certain to be fraudulent.
- The filing of a federal tax lien by the IRS is a public record. Your clients will be inundated not only with mail solicitations, but also by phone calls from people offering to resolve their tax problems. Unfortunately it can be very easy to impersonate an IRS official. If your clients have a federal tax lien filed against them, the mail and phone solicitations offering to “solve their tax problems” can be relentless. Some of the written solicitations look strikingly like official IRS communications.

Surprising income tax result when cashing life insurance

Typically, when surrendering a life insurance policy, income is determined by subtracting the premium paid from the cash received. However, as can be seen in Brown v. Comm, 110 AFTR 2d 2012 (CA7 09/11/2012), this is not always the case.

If some of the life insurance coverage was previously surrendered, this reduces the policy investment in the policy. In addition, if some of the dividends earned on the policy purchased additional coverage, this also reduces the investment. Likewise, if the cash value reduced a policy loan, the policy loan amount is added to the amount of cash received. Be very careful when considering the possible tax result when a life insurance policy is surrendered. There may be unexpected gains subject to income tax.

Michael A. Lampert, Esq., is a board certified tax lawyer and 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.
**1040, 1041 and 706s: What probate attorneys need to know about tax returns**

**The tale:**
You are representing the personal representative of an estate. He calls you to find out what his accountant is talking about. He knows a tax return must be filed, but there is confusion about why and which one. The accountant has told him to ask you. What do you answer?

**The tip:**
A personal representative has a duty to file several different types of returns. It is important that you have enough of an understanding of these returns to advise your personal representative, even if it is just to go find a better informed accountant!

**The 1040**

Form 1040 is the U.S. Individual Income Tax Return. The decedent will be required to file a 1040 for the year of death. Even if your decedent died in April, he or she will file a return for the short year of Jan. 1 to Apr. 30. Since most individuals are cash basis taxpayers, the amount included on this return will be income that was actually or constructively received, and the deductions that can be taken will be for expenses actually paid. If no personal representative will be appointed and your decedent is due a refund, the person filing the return will have to file a Form 1310 Statement of Person Claiming Refund Due a Deceased Taxpayer. This could apply if you are assisting a client with a summary administration.

**The 1041**

Form 1041 is the U.S. Income Tax Return for Estates and Trusts. A trust and an estate are separate taxable entities and require separate federal tax ID numbers. Both file a Form 1041. A trust or a decedent’s estate figures its gross income in much the same manner as an individual. Most deductions and credits allowed to individuals are also allowed to estates and trusts. However, there is one major distinction. A trust or a decedent’s estate is allowed an income distribution deduction for distributions to beneficiaries. The income distribution deduction determines the amount of any distributions taxed to the beneficiaries. Because of this, the trust or the estate is like a pass-through entity, and the beneficiaries’ taxable share of the distribution is shown on a Schedule K-1. This income deduction is known as distributable net income or DNI.

Internal Revenue Code Section 645 permits the executor of the decedent’s probate estate and the trustee of the decedent’s revocable trust to have the trust taxed as part of the probate estate. This section can be used to allow a trust to have a fiscal year rather than have a Dec. 31 year end. Why does this matter? A beneficiary reports income from the estate on his or her 1040 in the year in which the estate’s taxable year ends. So, if a distribution is made in February 2012, but the tax year of the estate ends Jan. 31, 2013, the K-1 showing the distribution will be received and used by the beneficiary to report the income on that beneficiary’s 2013 tax return, which is not due until Apr. 15, 2014.

**The 706**

Form 706 is the U.S. Estate (and Generation-Skipping Transfer) Tax Return. This is the return your personal representative must file if the decedent has an estate that will be subject to federal estate tax. The federal estate tax is a tax on the decedent’s right to transfer property at death. It consists of an accounting of everything the decedent owned or had certain interests in at the date of death. The fair market value of these items is used, not necessarily what was paid for them or what their values were when they were acquired. The total of all of these items is the “gross estate.” The includible property may consist of cash and securities, real estate, insurance, trusts, annuities, business interests and other assets.

Once the gross estate is ascertained, certain deductions (and in special circumstances, reductions to value) are allowed in arriving at the “taxable estate.” These deductions may include mortgages and other debts, estate administration expenses, property that passes to surviving spouses and qualified charities. The value of some operating business interests or farms may be reduced for estates that qualify.

After the net amount is computed, the value of lifetime taxable gifts (beginning with gifts made in 1977) is added to this number and the tax is computed. The tax is then reduced by the available unified credit. The unified credit on the basic exclusion amount for 2012 is $1,772,800 (excluding $5,120,000 from tax). But on Dec. 31, 2012, the Bush tax credits are expected to expire. If they do, the unified exclusion will be $345,800, exempting only $1 million from tax.

You should be able to identify these issues and communicate them to personal representatives so you can be sure they carry out all their responsibilities.
Will contest/pleading


A notice of administration of the estate of Mary N. Porter (the decedent) was served on the Pasquale brothers, which admitted a 2005 will to probate. In response, the brothers filed a four-count complaint, alleging undue influence and lack of capacity.

The facts reflected that in 1991, the decedent executed a will leaving substantial gifts to the Pasquale brothers and in 1999 executed an irrevocable trust benefitting the brothers and another individual known as George Jimenez. The complaint alleged that, between the years of 1991 and 2007, the decedent executed 13 trust amendments and codicils, the result of which revoked the gifts to the brothers and also reflected a diminishing value of the decedent’s assets. The 2005 will incorporated the 1999 trust by reference, and therefore the court noted the Pasquales had to challenge both.

The Pasquales alleged Jimenez and appellees Habayeb and Stewart began in 2000 to exert undue influence over the decedent, causing her to change her testamentary estate plan. The appellants asserted that all estate plan documents executed by Porter after 2000 were null and void, and they sought to have the 1999 trust reinstated. The 2005 will read in pertinent part:

I give all the residue of my estate, including my homestead, to the Trustee then serving under my revocable Trust Agreement dated October 26, 1999, as amended or hereafter amended (the Existing Trust), as Trustee .... The residue should be added to and become a part of the Existing Trust ...

In reversing the trial court, the appellate court reasoned that the Pasquales would have to exhaust their remedies in the probate court before an independent claim could be pursued. The appellate court found that the complaint “while not a model of clarity” sufficiently constituted a will contest and was, therefore, wrongly dismissed in the lower court. In support, the court cited to Fla. Prob. R. 5.020 for the proposition that no defect in a complaint should impair substantive rights and to Fla. Prob. R 5.270 for the proposition that allows for a revocation of probate.

The court found that Count I of the complaint challenged the validity of testamentary instruments executed after the year 2000, Count II alleged lack of testamentary capacity to amend her estate plan and Count III alleged undue influence, and therefore was properly pleaded and sufficient to state a cause of action to contest the will.

The court reversed the dismissal and remanded for further proceedings, but expressed no opinion on the merits.

Obviously the ruling was based on procedure, relying on the general proposition that pleadings should be liberally construed and not be a basis to hinder substantive rights.

Jurisdiction

Marcia Beekhuis, as Trustee of Irene Morris Revocable Trust, Appellant, v. Steven Morris, Appellee, 89 So. 2d. 1114 (June, 2012)

This case arises from an appeal of a non-final order granting emergency motion to appoint a court monitor and to enjoin the trustee from sale of the ward’s home and a request for immediate injunction. The appellant, Marcia Beekhuis, argued that the probate court did not have jurisdiction of trust assets. The Fourth District agreed and reversed the trial court’s decision.

The trust at issue in the case was the Irene Morris Revocable Trust. Irene Morris was the mother of appellant Beekhuis and appellee Steven Morris.

Before her death, Irene Morris was legally determined to be incapacitated, and Steven Morris was appointed guardian of the person and property. Upon becoming guardian, Steven Morris filed several motions in the guardianship, seeking to have his sister Marcia Beekhuis removed as trustee of her mother’s trust and for her to release trust assets. Beekhuis argued that the guardianship court lacked jurisdiction over the trustee and trust property. Irene Morris’s home was a trust asset. As trustee, Beekhuis planned to sell her mother’s home.

In an attempt to prevent this, Steven Morris then filed an emergency motion to appoint a court monitor and to enjoin the trustee from sale of the ward’s home and a request for immediate injunction. The probate judge, without notice or hearing, signed the ex-parte order prohibiting Beekhuis from selling the home and ordering her to convey trust assets to Steven Morris.

The appeal followed. Beekhuis argued that the probate court lacked jurisdiction over the trust and the trustee, stating that she did not appear or file anything in her capacity as trustee to subject her as trustee to the court’s jurisdiction, but rather she appeared in her individual capacity. She relied on Chaffin v. Overstreet 982 So. 2d. 11 (Fla. 5th DCA 2008), which held that appearing in a probate court in one capacity does not subject that party in a separate capacity to the jurisdiction of the court.

The Fourth DCA concluded that it was error for the probate court to assert jurisdiction over the trust property.
Construction of testamentary instrument/ ambiguity

Miami Children’s Hospital Foundation Inc., Appellant, v. Estate of Elaine B. Hillman, Miami Care Foundation Inc., and Anthony Wolfe, Appellees, 4D11-2153 (Fla. 4th DCA 2012)

The issue in this case is whether the intended beneficiary was Miami Children’s Hospital Foundation Inc. (MCHF) or Miami Care Foundation Inc. (Miami Care). Elaine Hillman died July 13, 2007. She had both a pour-over will and a trust. The will was dated Apr. 27, 2004, in which she left the residue to the trustee under a trust agreement dated Aug. 29, 1991, and the first amendment to her trust was signed on Apr. 27, 2004.

A petition for administration was filed on Aug. 16, 2007. On Sept. 17, 2010, both MCHF and Miami Care were sent a notice of final accounting and petition for discharge. In response, Miami Care, joined by Dr. Anthony Wolfe, objected to the final accounting and petition for discharge, and stated they believed they were to be the intended beneficiary. Thereafter, the personal representative of the estate filed a petition to determine beneficiary, alleging that both MCHF and Miami Care, joined by Dr. Anthony Wolfe, claimed to be Hillman’s intended beneficiary.

The bequest in the trust read in pertinent part as follows:

Twenty-five percent (25%) to Miami Children’s Hospital Foundation, Cranial/Facial Foundation located at 3000 S.W. 62nd Ave., Miami, Fla. ATT: Dr. Anthony Wolfe.

In response to the petition to determine beneficiary, MCHF contended that Miami Children’s Hospital, at all times, was supported by MCHF and offered cranial/facial services. MCHF further contended that Miami Care did not even exist when the trust and the amendments were executed.

The trial court concluded that Hillman’s intent was to have Wolfe control the assets, and therefore the trust language was ambiguous. At the time of the hearing, Wolfe was the head of Miami Care. Therefore, the court ruled that Miami Care was the intended beneficiary.

On appeal, MCHF argued that the trial court erred because there was no ambiguity, and it was clear on its face that MCHF was the intended beneficiary and that Miami Care could not have been the intended beneficiary because it was not in existence at the time the trust was executed.

The Fourth District reversed and remanded to the trial court with a directive to vacate the order determining Miami Care was the intended beneficiary and to enter an order determining MCHF was the proper beneficiary.

The ruling was based on the general principle that a court can only look beyond the four corners of the testamentary instrument if the language is ambiguous or there is an inaccuracy. Only then can a court admit extrinsic evidence with respect to the ambiguity or mistake. The appellate court believed that the intent to have MCHF benefit was clear and unambiguous.

The take-home message here is a reminder that a charitable institution, many of which have similar names, should be described as completely and accurately as possible to avoid litigation. This is an unusual case because the charity appeared to have been correctly identified in the trust, and the charity ultimately prevailed, though only after expensive litigation.

Life insurance proceeds/ availability to creditors/ important practice implications

Kevin A. Morey, as Personal Representative of the Estate of Carlton W. Morey, Jr., and as Trustee of the amended and restated revocable Trust of Carlton W. Morey, Jr., dated October 1, 2004, Appellant, v. Everbank and Air Craun Inc., Appellees, Case No. 1D11-1401 (1st DCA 2012)

This case addresses the issue whether and under what circumstances the proceeds of a life insurance policy are subject to creditor claims against an estate. Here, the settler, Carlton W. Morey, Jr., had created a revocable trust and named the trust as a beneficiary of one of his

continued, next page
life insurance policies. His brother, the trustee, filed a petition requesting an order determining that the life insurance proceeds were exempt from the estate and its creditors. The trial court found the life insurance proceeds were subject to the creditors' claims.

In affirming the decision of the trial judge, the First District cited to Section 733.808(1), which provides that death benefits may be made payable to the trustee under a trust agreement in existence at the time of death, but also stating in relevant part:

The death benefits shall be held and disposed of by the trustee in accordance with the terms of the trust as they appear in writing on the date of death of the insured, employee, or annuitant, owner or participant.

Therefore, whether creditors can reach the proceeds of a life insurance made payable to a trust depends on the trust's language.

The court looked at the language of Morey's trust at the date of his death. In concluding that the creditors could reach the life insurance proceeds, the trial court found that it was undisputed that the life insurance beneficiary was the trust and specifically relied on Article V of the trust which read:

**ARTICLE V DISPOSITION OF TRUST BALANCE SUBSEQUENT TO THE DEATH OF THE SETTLOR**

Upon the death of Settlor ... the Trustee shall pay over and distribute the trust estate as the same shall then consist as follows:

The Trustee shall pay to the domiciliary personal Representative of the Settlor's estate from time to time such sum or sums as such Personal Representative may certify to be required to pay the Settlor's death obligations, and such other obligations required to be paid under Florida law ....

Another trust provision provided that the trustee shall pay the settlor's enforceable debts.

On appeal, the trustee appellant conceded that Fla. Stat. Sect. 733.808(1) provided some support for the trial court's ruling, but argued that Fla. Stat. Sect. 222.13(1) creates a conflict and should also be considered. That section reads:

Whenever any person residing in the state shall die leaving insurance on his or her life, the said insurance shall inure exclusively to the benefit of the person for whose use and benefit such insurance is designated in the policy, and the proceeds thereof shall be exempt from the claims of creditors of the insured unless the insurance policy or a valid assignment thereof provides otherwise. Notwithstanding the foregoing, whenever the insurance, by designation or otherwise, is payable to the insured or to the insured's estate or to his or her executors, administrators, or assigns, the insurance proceeds shall become a part of the insured's estate for all purposes and shall be administered by the personal representative of the estate of the insured in accordance with the probate laws of the state in like manner as other assets of the insured's estate.

Rather than creating a conflict, the First District concluded that although Fla. Stat. Sect. 222.13(1) allows an exemption from creditors' reach of life insurance proceeds, it also allows for a waiver of that exemption.

The court reasoned that an insurance policy is a contract, and the right to choose a beneficiary is part of the freedom to contract. It concluded that the settlor decedent had waived the exemption provided in Fla. Stat. Sect. 222.13(1) by the language of the trust agreement, which provided for the payment of "death obligations."

This case provides a cautionary tale to estate planners. If the settlor, grantor, testator does not intend the life insurance to be available to pay creditors, he or she should either not designate his or her trust or estate as the beneficiary, or in the alternative, exclude the payment of debts language that Morey had in his trust agreement.
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The Elder Law Section present

The Essentials of Elder Law
COURSE CLASSIFICATION: INTERMEDIATE LEVEL

~ and ~

The Elder Law Annual Update and Review Course
COURSE CLASSIFICATION: ADVANCED LEVEL

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**SCHEDULE – DAY 1**

**Essentials of Elder Law**

**COURSE CLASSIFICATION:**
INTERMEDIATE LEVEL

**Live Presentation:**
Thursday, January 17, 2013
Course No. 1537R

**CLE CREDITS**

| CLER PROGRAM | (Max. Credit: 9.5 hours) General: 9.5 hoursEthics: 1.0 |
|CERTIFICATION PROGRAM | (Max. Credit: 7.0 hours) Elder Law: 7.0 hours Wills, Trusts & Estates: 7.0 hours |

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<td>7:50 a.m. – 8:15 a.m.</td>
<td>Late Registration – Continental Breakfast</td>
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<td>8:15 a.m. – 8:20 a.m.</td>
<td>Welcome and Announcements John Clardy, Crystal River Brandon Arkin, Palm Beach Garden</td>
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<td>8:20 a.m. – 9:00 a.m.</td>
<td>Ethics Ed Boyer, Sarasota</td>
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<td>9:00 a.m. – 9:40 a.m.</td>
<td>Elder Abuse Preston Mighdoll, West Palm Beach</td>
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<td>9:40 a.m. – 10:30 a.m.</td>
<td>Guardianship Alex Cuello, Miami</td>
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<td>Pre-Mortem Legal Planning (Property) Genny Bernstein, Palm Beach Gardens</td>
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<td>Health Care Decision-Making Enrique Zamora, Miami</td>
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<td>Social Security Benefits David Lillesand, Clearwater</td>
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<td>Special Needs Trusts David Lillesand, Clearwater</td>
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<td>Veteran’s Benefits Valerie Peterson, Eugene, Oregon</td>
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<td>Medicare/Medicaid Rebecca Bell, Port Richey</td>
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<td>6:00 p.m. – 7:30 p.m.</td>
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The Elder Law Annual Update and Review Course is a comprehensive review course covering the key practice areas lawyers need to know in order to work with and plan for elderly and special needs clientele. In addition, the course will cover the recent changes practitioners need to know and will discuss the common legal and ethical pitfalls arising from working with the elderly and those with special needs. For attorneys preparing to take the Elder Law Board Certification exam, the course includes special components designed to provide invaluable tips and assistance in preparing for the exam.

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- Ethics: 1.0

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<td>Non-section member</td>
<td>Full-time law college faculty or full-time law student</td>
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