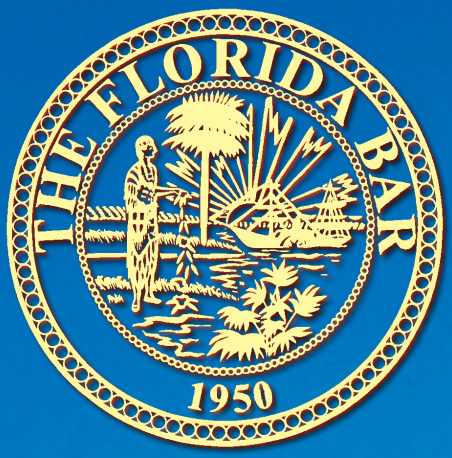

The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Vol. XIX, No. 2
Summer 2011
www.eldersection.org

The Elder Law Advocate

Established 1991

A publication of the Elder Law Section of The Florida Bar

COVER ART

"Jellyfish" by Timothy B. Darby, Darby Law Group PA, Lakeland, Fla.

Contents:

The deadline for the FALL ISSUE is November 1, 2011. 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 Patricia I. "Tish" Taylor, Esquire, pit@mccarthysummers.com, or call Arlee Colman at 800/342-8060, ext. 5625, for additional information.

The next 20 years

The Elder Law Section of The Florida Bar has passed its 20-year mark and is now embarking on the next 20 years with great focus and purpose. Serving as chair this past year has given me a unique opportunity to view what is becoming the new paradigm in the practice of elder law. I will not go as far as *The Jetsons* did 40 years ago by predicting personal flying transportation; however, I can predict other amazing events.

During the past 20 years, the Elder Law Section and the Academy of Florida Elder Law Attorneys formed the Public Policy Task Force for the purpose of advocating for the rights of our clients and to preserve our practices. This year's legislative session taught us that advocacy is not enough. In the future we will need alliances with other groups with common interests as well as relationships with key legislators. This is not something we can wait to do at the beginning of each legislative session; these alliances must be cultivated throughout the year. Forming alliances can be accomplished by working with state senators and representatives on proposed legislation, before bills are filed, so we are not reacting but being proactive.

Our committees, which have increased in number during the first 20 years, will be reduced to smaller numbers but will have greater participation by our members. Increased participation will allow us to move quickly, with strength, when it is needed. The committee members' involvement may include brief writing, public speaking, federal litigation and increased participation in Fair Hearings.

What began with some of our section members participating on committees with the Real Property, Probate and Trust Law Section and continued with joint programming with the Health Law Section will continue with new relationships forming with other sections. Some of those sections will be Trial Lawyers, Appellate Lawyers and Administrative Lawyers. The skills of these sections' members will be important to us as the Legislature and the courts continue to "push back" on gains made in the past for assistance to those in need of public benefits.

As the World War II, Korean and Viet Nam veterans pass from the scene, a new population of veterans from the Gulf Wars, Iraq and Afghanistan will be in need of services that will be difficult for some to attain and that will require legal representation in greater numbers than ever before.

Leonard E. Mondschein

Message from the outgoing chair

Our section members will be trained to help those veterans receive the benefits they are entitled to under the law. This year's vote to make the Veterans' Benefits Committee a bylaws committee positions us for that future.

Increased sponsorship from banks, health care organizations, pooled trusts and other organizations that work with elder law attorneys will allow the section to grow our level of advocacy so that we will have the financial resources needed to fight "the good fight." With increased sponsorship, the Public Policy Task Force will be able to file rule challenges when needed, and we will be able to increase our lobbying efforts. As a result of additional sponsorship, our CLE programs will have more to offer our members and, consequently, will increase membership.

Diversity of our members, which was a goal during the first 20 years of our section, will become a reality. This year, the Elder Law Section has its first Cuban-born chair, and other minorities hold Executive Council positions. Our reaching out to law students will bring in new members, accelerating our goal of diversity within the section. Programming will reflect cultural differences and will allow our members to reach all citizens of our state.

As we saw this year with our members being quoted in the press, we will increase our efforts to gain public awareness on issues regarding health care, housing, residents' rights, exploitation of the elderly and public benefits. Legislators who want to reduce government regulation of assisting living facilities and skilled nursing homes and who want to limit access to health care and much needed medical services will be the subject of more op-ed pieces in major newspapers. The voting public will know where their state senators and representatives really stand.

For many years there has been talk about a national bar exam, which would allow attorneys to practice law across state lines. While multidisciplinary practice has not come to pass in Florida, the relationship between elder law attorneys from one state to the next has de facto come together through the National Academy of Elder Law Attorneys (NAELA). The personal relationships and splinter organizations created as a result of NAELA affiliation position our specialty of elder law for any national law practices that will result from a uniform bar exam. The federal underpinnings of social security law, Medicare, Medicaid and veterans' benefits will foster this interstate relationship.

Continuing legal education will take advantage of recent technology with greater use of online programming such as webinars and call-ins,

continued, next page

Message from the chair
from preceding page

reducing the cost of continuing legal education by eliminating travel, hotels and time away from the office. While the use of technology will eliminate some in-person meetings, greater emphasis will be placed on the remaining meetings to encourage higher attendance.

In this last chair's message, I have intentionally not mentioned specific members and their accomplishments because I have previously done so in past issues this year. Notwithstanding, I want to thank Arlee Colman, our program administrator, for all her help, support and guidance, as well as my friend and colleague, Enrique Zamora, our new chair.

Thank you all for allowing me to serve as your chair this past year, and let us all support Enrique as he begins the next 20 years of the Elder Law Section. I look forward to seeing all of you in 20 years, arriving at our annual meeting in our personal flying vehicles.

Member news

Nicola Melby receives certification in elder law

Attorney Nicola J. Melby of McGuire, Wood & Bissette PA has successfully completed examination by the National Elder Law Foundation (NELF) and has achieved its national designation of Certified Elder Law Attorney. Available to clients through the firm's Asheville and Brevard offices, Ms. Melby has practiced elder law exclusively for 16 years. Her practice areas include elder and special needs law, estate planning and administration, and guardianship and counseling for disabilities.

Ms. Melby began her practice in North Carolina after receiving her license in April 2008. She is board certified in the field of elder law by The Florida Bar, having been licensed to practice in Florida since 1992. Melby holds an AV peer review rating from the prestigious attorney listing service of Martindale-Hubbell, which is the highest rating an attorney can earn from peer evaluations. She is a member of the North Carolina Bar sections on Elder Law and Estate Planning and Fiduciary Law, and is also a member of the National Academy of Elder Law Attorneys, The Florida Bar's Elder Law Section and the Florida and North Carolina Chapters of the National Academy of Elder Law Attorneys. In both 2001 and 2004, Melby was named Member of the Year by The Florida Bar's Elder Law Section. She graduated summa cum laude from the University of New Haven and received her JD magna cum laude from Stetson College of Law. Ms. Melby is a frequent guest speaker at support groups, community organizations and charitable and continuing education events.

Twyla Sketchley is a FAWL Leader in the Law

Twyla Sketchley, chair-elect of the Elder Law Section, has been named one of the Florida Association for Women's Lawyers 2011 Leaders in the Law for her involvement in activities that have bettered her community, activities as a positive role model in the legal profession and her work to advance the cause of women in her community.

Ms. Sketchley is Florida Bar board certified in elder law and the managing attorney for The Sketchley Law Firm PA. She can be reached at 850/894-0152.

Mindy Stein is JARC's Volunteer of the Year

Mindy Stein was honored with the Volunteer of the Year Award at the Jewish Association for Residential Care's annual gala on Mar. 13, 2011. The award was given for providing pro bono services to a JARC resident whose family in New York was trying to force him to leave Florida and return to New York.

"The ultimate result was the judge's decision to allow appointment of a guardian advocate for the resident, a cousin in Florida that was selected by the resident," Ms. Stein says. "Our resident had his day in court. The judge listened and the resident prevailed. The appointment of the guardian advocate means that the resident will be able to stay here at JARC for the rest of his life."

JARC (*http://jarcfl.org*) is an independent 501(c)(3) nonprofit, nonsectarian organization that operates 10 group homes for adults with developmental disabilities. The homes are located in the Boca Raton/Delray Beach area of South Florida. JARC also offers apartment living and vocational training for those who do not require 24-hour supervision.

2012 ELS Retreat – All Day VA

THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee and The Elder Law Section present

ALL DAY VA –

Tips on Veterans Benefits for Florida Attorneys

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

One Location:
Friday, September 16, 2011 • The Breakers • Palm Beach, FL 33480
(561) 655-6611 • www.TheBreakers.com

Course No. 1389R

Contact The Florida Bar to register (850-561-5831) or visit the section's website at www.eldersection.org for the entire brochure.

THURSDAY SEPTEMBER 15

4:00 p.m. – 6:00 p.m.
Executive Council Meeting

6:30 p.m. – 9:30 p.m.
Member Dinner
($30 per person/ children - free)

FRIDAY SEPTEMBER 16

8:00 a.m. – 8:30 a.m.
Check-In (Continental Breakfast)

8:30 a.m. – 8:50 a.m.
Welcome and Introductions
Update on Current Changes to VA Requirements
Jack Rosenkranz, Jacksonville

8:50 a.m. – 9:40 a.m.
Department of Defense, TRICARE for Life and Champ VA
Karen McIntyre, Atlanta

9:40 a.m. – 10:30 a.m.
Introduction to VA Appeals
Hal Youmans, Riverview

10:30 a.m. – 10:40 a.m.
Break

10:40 a.m. – 11:30 a.m.
Introduction to VA Application Process
Greg Glenn, Boca Raton

11:30 a.m. – 12:00 noon
Questions and Answers with Morning Speakers

12:00 noon – 1:00 p.m.
Lunch (included in registration)

1:00 p.m. – 1:50 p.m.
Tips and Tales in Application Process
Alice Reiter Feld, Tamarac

1:50 p.m. – 2:40 p.m.
DIC with A&A vs. NSC Pension with A&A
Brandon Arkin, North Miami

2:40 p.m. – 2:55 p.m.
Break

2:55 p.m. – 3:25 p.m.
State VA Homes
Victoria Heuler, Tallahassee

3:25 p.m. – 4:15 p.m.
Evaluating IRA Choices for VA Benefits
Jim Swain, Washington

4:15 p.m. – 5:05 p.m.
Current Status for Verification of VA Payments for Medicaid Eligibility
Jack Rosenkranz, Tampa

CLE CREDITS

CLER PROGRAM

(Max. Credit: 8.5 hours)

General: 8.5 hours
Ethics: 0.0 hours

CERTIFICATION PROGRAM

(Max. Credit: 8.5 hours)

Elder Law: 6.5 hours
State & Federal Gov't & Administrative Practice: 8.5 hours

Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News or available in your CLE record on-line) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).

The Joint Public Policy Task Force

A Partnership of

The Academy of Florida Elder Law Attorneys & The Elder Law Section of The Florida Bar

Thank You, Contributors!

These attorneys and firms financially support the Joint Public Policy Task Force.

The task force and your peers need **your** support to further the task force's accomplishments on ***all*** our behalf and for the future of our practices.

A Special Thank You to the following Major Contributors:

Guardian Trust
Elder Planning Income Concepts LLC

Benefactor $5,000 and above

Deeb Elder Law PA
Hook Law Group

Founder $2,500 - $4,999

The Elder Law Center of Mondschein and Mondschein
Osterhout, McKinney, Prather & Swank
The Elder Law Center of Kirson & Fuller
Elder Law Associates
Karol Hausman Sosnik & Finchum LLP
Kathleen Flammia PA
Carolyn Landon

Patron $1,500 - $2,499

Babette Bach
Sawyer and Sawyer PA
Michael D. Fowler
Sam W. Boone, Jr.
Barbara S. Buxton
Colleen M. Duris
Law Office of Emma Hemness PA
Hoyt & Bryan LLC
Law Office of Norma Hand Brill PA

Sponsor $750 - $1,499

Patricia I. "Tish" Taylor
Paul I. Auerbach
Burzynski Elder Law
Kotler Law Firm PL
Walter B. Shurden
Waldoch & McConnaughhay PA
Glenda F. Swearingen
April D. Hill
Victoria E. Heuler
Vicki Joiner Bowers PA
Pamela M. Burdick
Gerald R. Colen
Law Office of Kevin M. Gilhool
Arlene Lakin
Todd R. Zellen PA
Linda Solash-Reed PL
Mark W. Mazzeo
Miller & Brasington PL
Robert M. Morgan
Laurie E. Ohall
Jason A. Penrod
Twyla Sketchley

Friend $500 - $749

Suarez & Taylor, Attorneys at Law
Behar, Gutt & Glazer PA
Mary Ellen Ceely PL
Marie S. Conforti
Thomas R. Conklin
DeLoach & Hofstra PA
Barbara A. Epstein
Kara Evans
John R. Frazier
Jennifer R. Howell
Lillesand and Wolasky PL
Sheri Lund Kerney
Ailish O'Connor
Julie Saieg
Senior Counsel, Attorneys at Law PA
Erik P. Shuman

Other Contributors

Nicola J. Melby
Schofield & Spencer PA
Dana P. Bowie

Awards given at annual TFB convention

Section Chair Leonard Mondschein (center) of Mondschein and Mondschein in Miami presents the Lifetime Achievement Award to Ray Parri of Raymond L. Parri PA in Clearwater and Jerry Solkoff (right) of Jerome Solkoff PA in Delray Beach. Dan Parri (left) of The Parri Law Firm PLLC in Clearwater accepts the award on behalf of his father.

Jerry Solkoff accepts the Lifetime Achievement award from Chair Leonard Mondschein. Jerry's son, Scott Solkoff (not pictured) of Solkoff Legal in Delray Beach, a past chair of the section, was a proud onlooker.

Chair Leonard Mondschein presents the 2011 Elder Law Section Member of the Year award to Emma Hemness of Emma Hemness PA in Brandon.

Chair Leonard Mondschein presents the Charlotte Brayer Award to Jack Rosenkranz of Rosenkranz Law Firm in Tampa.

Randy Bryan (right) accepts a plaque recognizing his work on the Elder Law/AFELA Joint Task Force.

Before taking office as 2011-2012 chair, Enrique Zamora (right) of Zamora & Hillman in Coconut Grove is presented an award for his work as co-chair of the 2010 Elder Law Section Retreat.

Chair Leonard Mondschein presents Ellen Morris of Elder Law Associates PA in Boca Raton with a plaque recognizing her contribution as co-chair of the 2010 Elder Law Section Retreat.

During the passing of the gavel, Immediate Past Chair Leonard Mondschein accepts accolades from incoming Chair Enrique Zamora.

David Hook (right) of The Hook Law Group in New Port Richey and Collett Small (center) of the Law Offices of Collett P. Small in Pembroke Pines are recognized for their work as co-chairs of the 2011 Elder Law Certification Review Course.

Chair Leonard Mondschein thanks Arlee J. Colman, program administrator with The Florida Bar, for her work on behalf of the section.

Elder law attorneys provide testimony on Florida Medicaid managed care

Thank you to these fine elder law attorneys who participated in the AHCA public hearings on Florida Medicaid managed care, held June 10-17, 2011.

FORT LAUDERDALE
Pamela Burdick, Barbara Buxton, Greg Glenn, Elaine Schwartz

FORT MYERS
Teresa Bowman, Norma Hand Brill, Heidi Brown, Brandon Bytnar, Grace Crawford, Steve Kotler, Mark Mazzeo, Britton Swank

GAINESVILLE
Sam Boone, Monica Brasington, John Clardy, Shannon Miller, Nancy Wright

JACKSONVILLE
Vicki Bowers, Deborah Knauer, Robert Morgan, Ailish O'Conner, Julie Saieg, Jennifer Williams

MIAMI
Jackie Schneider, Elaine Schwartz, Steve Taylor, Marjorie Wolasky

ORLANDO
Randy Bryan, Aubrey Ducker, Patti Fuller, Meena Hirani, Carolyn Sawyer, Linda Solash-Reed

PENSACOLA
Steve Quinnell, Glenda Swearingen, Jason Waddell, C. Jason White

ST. PETERSBURG
Stephanie Edwards, Travis Finchum, April Hill, David Lillesand, Bob Nordstrom, Charlie Robinson

TALLAHASSEE
Jana McConnaughhay, Twyla Sketchley, Glenda Swearingen, Lauchlin Waldoch

TAMPA
Rebecca Bell, Ann Cholowski Debra Dandar, Ben Darby, Kara Evans, Emma Hemness, Dana Kemper, Laurie Ohall, Jack Rosenkranz

WEST PALM BEACH
Greg Glenn, Lisa Klein Goldstein, Sheri Greenblatt, Carolyn Landon, Ellen Morris, Mindy Stein, Tish Taylor, Todd Zellen

And a special thank you to our region team leaders, **Sam Boone, Jill Burzynski, Barbara Buxton, John Clardy, Patti Fuller, Jana McConnaughhay, Laurie Ohall, Charlie Robinson, Elaine Schwartz, Scott Selis, Mindy Stein, Glenda Swearingen, Jason White, Jennifer Williams** and **Marjorie Wolasky.**

MARK YOUR CALENDAR!

September 15-17, 2011 (New Date!)
THE ELDER LAW SECTION RETREAT
The Breakers, Palm Beach, Fla.

Thursday, September 15, 2011 • 4-6 p.m.
SECTION EXECUTIVE COUNCIL MEETING

Thursday, September 15, 2011 • 6:30-9 p.m.
ALL MEMBER DINNER

* * *

January 12-13, 2012
ELDER LAW CERTIFICATION REVIEW
Reunion Resort, Orlando, Fla.

* * *

Thursday, January 12, 2011 • 6-7:30 p.m.
SECTION EXECUTIVE COUNCIL MEETING

Thursday, April 12, 2012 • 6-7:30 p.m.
SECTION EXECUTIVE COUNCIL MEETING

* * *

Friday, April 13, 2012
ANNUAL PUBLIC BENEFITS
LIVE WITH SIMULTANEOUS WEBCAST
Tampa, Fla. (hotel to be announced)

* * *

Friday, June 22, 2012
ELDER LAW SECTION ANNUAL MEETING
Section Chair's Training – 11 a.m.
Awards Luncheon – 12 noon
Section Executive Council Meeting – 2 p.m.

COMMITTEE REPORTS

Abuse Neglect & Exploitation Committee

Carolyn H. Sawyer and Gerald L. Hemness, Jr., co-chairs

The committee's major project for the year was collaborating with the Office of the Attorney General to put on a three-day workshop entitled "The Trusting Elder – Investigating Elder Financial Exploitation." This event took place June 1-3, 2011, in Tampa at the Sheraton Suites Hotel. There were 29 attendees, including 15 officers from sheriff's departments (Pasco, DeSoto, Osceola, Okeechobee, St. John's, Seminole, Sarasota, Pinellas and Martin), four from the Attorney General's Office, one from Palm Beach Police Department and four from State Attorney's Offices in the 17th, 18th, 12th and 6th circuits. Mike Winn, elder law attorney, attended all three days, as did John Dorony, CPA, a volunteer who has assisted law enforcement on elder exploitation cases.

The ANE committee voted to use some of the funds that have been donated to The Florida Bar for use by the committee in furthering its goals to award scholarships to applicants who wanted to attend the workshop. Ten applications were received; each applicant has or will receive $150 toward his or her expenses.

The goal of this workshop was to review both criminal *and* civil means of investigating and prosecuting the exploiters of the elderly that yield the best results. The planning committee was composed of Margaret Boeth (Attorney General's Office), Darla Dooley (State Attorney's Office, 10th Judicial Circuit) and ANE committee members Gerald Hemness, Wayne Ekren and Carolyn Sawyer.

The presenters were an excellent group of prosecutors, elder law attorneys, law enforcement officers, a representative from APS/DCF and a software specialist in detecting fraud in banking transactions. The format included two panel discussions, individual presentations and interactive case studies. Tom Sawyer, M.D., J.D., began the program by discussing capacity issues and measures he has developed over the years he has been serving as a physician member of examining committees in guardianship cases.

Darla Dooly laid the groundwork for the workshop with an overview of Florida's relevant criminal and civil statutes that provide the tools to detect, investigate and prosecute exploiters. Erika Dine set the theme of the workshop in her presentation "Venue – Why Choose," explaining one of her cases that was pursued in both civil and criminal court.

Jay Hemness followed with a highly interactive and wide-ranging presentation on "Preparing the Civil Case" in the colorful way that is his unique style. Twyla Sketchley's presentation on the use of guardianship to recover a ward's assets after exploitation was a good follow-up, with specific steps for a guardian to take, considerations in deciding whether to go forward with a civil suit and ways a guardian can assist with the criminal case. Wayne Ekren followed that with an interactive session on "Sensitivity to the Elder Victim's Communicative Skills."

During the second day, Darla Dooley made a very detailed, lengthy and well-received presentation on "Preparing the Criminal Case," which addressed methods of gathering evidence, the interviewing process, preparing the case, convincing the prosecutor to take the case as well as other topics. Examples of obtaining and analyzing financial documents were given, including in one case, gambling records from a casino. We later found out that Darla had given her presentation in spite of having pneumonia!

All of the above speakers were given very positive evaluations by the participants.

There were two panels on the third day. The topic of the first was an assessment of Florida's overall effectiveness in dealing with the exploitation of the elderly and a discussion of possible improvements. The panel was composed of Aaron Calipari (Financial Information Services – FIS), Mary Jo LaMont (Miami-Dade Police Department) and Professors Roberta Flowers and Rebecca Morgan. Rebecca Morgan graciously and capably substituted for Ed Boyer, who had to cancel due to medical reasons. The evaluations of the participants included descriptions of these panelists as knowledgeable and well chosen, and the discussion was described as excellent and informative.

The second panel included presentations and discussions by David Hooks, Slade Dukes and Carolyn Sawyer of individual cases of exploitation. Comments from the evaluations of the participants included very positive feedback and even asked for more panel discussions in the future.

The meeting concluded with practical investigative applications sessions conducted by Deputy Rick Miller from the Seminole County Sheriff's Office.

The evaluations submitted by the participants for the overall workshop were very favorable, and those of us who planned and participated believe it was extremely worthwhile. We would like to make some modifications to the agenda, perhaps to include an administrative component, and the committee will consider putting on the workshop in a different area of the state.

Financial Products Special Committee

Jill J. Burzynski, chair

Among the issues the Financial Products Special Committee is considering is the funeral trust. David Sterling, a member of the committee,

continued, next page

has researched this important topic. The "funeral trust" arrangement promoted and sold by commercial insurance agents is basically an irrevocable trust agreement prepared by the issuing company and funded through the purchase of a single premium fully funded whole life insurance policy. No underwriting is required because the premium payment generally represents complete funding of the policy with issuance up to age 99.

The apparent conflict regarding the validity of these commercial products with the prepaid burial contracts accepted for Medicaid qualification is the absence of contractual obligation with predetermined funeral homes. **Ref. 1625.10.25 Irrevocable Burial Trusts**, which provides:

> If the irrevocable burial trust is created in connection with a funeral home or funeral director, it is treated like an irrevocable prepaid burial contract. As long as it is irrevocable, the trust is not considered an asset to the individual.
>
> If the irrevocable burial trust is not created in connection with a funeral home or funeral director, it is considered a transfer of assets.

A number of commercial carriers are no longer issuing the funeral trust in Florida. However, there is at least one carrier that continues to write the policies and has had them accepted by the Department of Children and Families (DCF). Apparently, the status of "funeral trust" acceptance rests with the discretionary authority of the DCF officer overseeing the Medicaid qualification review process. Additionally, the carrier who has been continuing to write the policies has taken steps to address the absence of a funeral home contractual relationship by providing channels to establish one with a reserved right of assignment. Other states are currently wrestling with this issue. A ruling issued from the state of West Virginia reads as follows: "Because these trusts are not agreements made with a funeral director, outlining specific merchandise and services, they do not meet the requirements for exclusion."

The committee would like to know if any section members have obtained Medicaid approval with a "funeral trust." Please contact Jill Burzynski at *jjb@burzynskilaw.com*.

The Financial Products Special Committee meets monthly at 4 p.m. on the last Tuesday of the month. The committee examines issues relating to financial products for the elderly, including annuities, reverse mortgages, long-term care insurance and most recently funeral trusts. If you would like to join this committee, please contact Jill Burzynski.

Guardianship Committee

Carolyn Landon and Melissa Lader Barnhardt, co-chairs

We are embarking on a new year and look forward to working with all interested members of the Elder Law Section on issues related to guardianship. The following are some areas we will concentrate on this year:

- Address joint ownership of assets especially as they affect the non-incapacitated spouse
- Amendment of Chapter 744 to add the ability of the court to take away the right to bear arms in guardianship proceedings
- Clarification of the legislative intent of Chapter 393 regarding guardian advocates and the relationship to Chapter 744

We welcome new members to join the Guardianship Committee and to provide additional ideas or concerns that would benefit our clients, the court and/or our members. Please contact either Carolyn Landon at *carolyn@landonlaw.net* or Melissa Lader Barnhardt at *melissa.l.barnhardt@wellsfargo.com* if you would like to join our committee.

Law School Liaison Committee

Brandon Arkin, chair

This will be an exciting year for the Law School Liaison Committee. Collett Small did an amazing job last year as committee chair. Under her

leadership, the committee established connections with the majority of Florida's law schools. Due in part to her efforts, the Elder Law Section currently has 50 student members from law schools throughout the state, and we even have one out-of-state student member, from Vanderbilt.

This year Collett is our new CLE chair and has passed the torch to the new chair, Brandon Arkin. Brandon plans to continue the work Collett started. He is seeking section members with strong affiliations with their law schools. It is his hope to have at least one section member affiliated with each law school with the goal that these connections will help establish stronger ties between the section and each of the Florida law schools. Currently, we have four section members who have volunteered to be liaisons; they are Scott Solkoff (Nova), Twyla Sketchley (FSU), Melissa Barnhardt (UM) and Brandon Arkin (St. Thomas). If you are a section member and are interested in promoting the Elder Law Section at one of the law schools, please contact Brandon Arkin at *brandon.arkin@gmail.com*.

Legislative Committee

Scott A. Selis, chair

The last legislative session saw proposals that could have seriously impacted the use of personal service agreements and spousal refusal. For example, one portion of the Medicaid Reform Act would have treated an inter-spousal transfer within the look-back period as a penalizable, uncompensated transfer. The same bill proposed that payments to a "relative" for services that are "normally provided out of love and consideration" would be uncompensated transfers, resulting in a penalty period.

Without the hard work of Emma Hemness, Ellen Morris and many elder law attorneys around the state, those changes and more would likely have become law. I fully expect that these proposals and others will arise during next year's legislative session. If these proposals ever become law, our clients will be significantly impacted.

So, the Elder Law Section MUST be assertive and effective advocates for the elderly with our state senators and representatives. To that end, the Legislative Committee will identify what laws will be proposed before the Legislature convenes and bills that are submitted when the legislative session begins. The Legislative Committee will determine whether the law will help or hurt elderly people, develop a position statement for consideration by the Elder Law Section and communicate with our legislators before and after the bills are introduced about positions the Elder Law Section has adopted.

My goal as chair of the Legislative Committee is to generate support for or opposition to proposed legislation before it is formally submitted, subject to the direction of the Elder Law Section's leadership. Reaching that goal will require participation from elder law attorneys all over the state.

The Legislative Committee will address a myriad of issues faced by the elderly. The Legislative Committee is charged with making recommenda-

continued, next page

Budget committee rejects 'Money Follows the Person' funding

On June 24, 2011, the Florida Legislative Budget Commission rejected $35.7 million in federal "Money Follows the Person" funding offered to the state by the federal government. This funding would have allowed Medicaid recipients to stay out of nursing homes and receive services at home or at a lower level of care. Representative Rob Schenk (R-Spring Hill) and Representative Denise Grimsley (R-Sebring) said that state efforts to get people out of nursing homes were sufficient and that the federal money would be duplicative.*

In addition to Representatives Schenk and Grimsley, the following legislators voted against the funding:

- Representative Ed Hooper (R-Clearwater)
- Representative Mike Horner (R-Kissimmee)
- Representative Matt Hudson (R-Naples)
- Senator Don Gaetz (R-Destin)
- Senator Garrett Richter (R-Naples)
- Senator Stephen R. Wise (R-Jacksonville)

Senators J.D. Alexander (R-Lake Wales) and Joe Negron (R-Palm City) broke with Republican ranks and voted in favor of accepting the funds, as did Democrats Representative Charles S. Chestnut IV (Gainesville), Representative Darryl Ervin Rouson (St. Petersburg), Senator Nan H. Rich (Sunrise) and Senator Gary Siplin (Orlando).

The grant for Money Follows the Person was created in 2005 under George W. Bush, but is now part of the federal Patient Protection and Affordable Care Act. House Speaker Dean Cannon has made it a policy to not implement any part of this law in the state of Florida.

Source: *St. Petersburg Times

tions to the Elder Law Section about proposed legislation involving the following subjects: probate; estate planning; guardianship, Medicaid; special needs planning; unauthorized practice of law; financial products; facility resident rights; and others.

Each of those subjects will or already has subcommittee chairs, and I have asked all of them to recruit attorneys in their areas of specialty or community to help educate our legislators about issues affecting the elderly. If you or someone you know would like to serve on the Legislative Committee or a subcommittee, or communicate directly with elected officials, please contact me at 386/445-8900 or by email at *sselis@palmcoastlaw.com*.

Medicaid Committee

John S. Clardy III and Emma S. Hemness, co-chairs

Since we last reported the activities of this committee (through Mar. 4, 2011), the Medicaid long-term care safety net for seniors, as we have known it until now, has changed drastically with the 2011 Florida Legislature's actions. Despite testimony from concerned advocates, including elder law attorneys, the goal of turning Medicaid over to managed care organizations was met in legislation that passed strictly along party lines. House Bill 7107, together with HB 7109, requires mandatory enrollment of nearly all Medicaid beneficiaries into managed care plans. Among the many provisions creating concerns for advocates, this legislation placed seniors with long-term care needs as the highest priority population group for mandatory enrollment into long-term care managed care plans, beginning July 1, 2012.

The basis for the Legislature's quest to privatize Medicaid—for nearly all population groups living in all counties in the state of Florida—is a pilot project that was implemented as a Section 1115 Demonstration Waiver granted by the federal government to the State of Florida's Agency for Health Care Administration (AHCA) on July 1, 2006. In the five years since the waiver request was granted to AHCA by the Center for Medicare and Medicaid Services (CMS), the pilot project operating in five Florida counties (including Duval and Broward) has mandated Medicaid enrollees, predominantly the poor and uninsured, to receive their health insurance coverages through managed care plans. The pilot project specifically excluded dual eligibles (seniors receiving both Medicare and Medicaid) and the developmentally disabled populations, due to their high intensity and specialized health care needs for chronic, ongoing conditions.

Even before the governor signed the legislation on June 2 for an effective date of July 1, 2011, for the law, AHCA announced public hearings at which providers, shareholders and the public could weigh in on the amendment to the existing waiver request for the purpose of expanding mandatory enrollment into managed care plans, both statewide and to all population groups of Medicaid enrollees. The AHCA hearings in each of its 11 regions were announced in the Florida Administrative Weekly on or about May 27 and were held June 10-17.

Hearings around the state were well attended by a wide cross section of advocates in opposition to the waiver's expansion, including a group of 60-plus elder law attorneys speaking on behalf of seniors. Many advocates spoke about their firsthand knowledge of how the pilot project had resulted in denial of care or a lack of quality care. Others spoke about havoc created in securing necessary medical coverage for Medicaid enrollees when managed care plans left the service areas. All comments provided at each of the hearings are to be submitted by AHCA to CMS for its consideration on whether or not to allow AHCA to amend its waiver request to expand mandatory enrollment into managed care coverage plans, both statewide and to all population groups. AHCA is scheduled to submit its request to expand the waiver to CMS by Aug. 1, 2011. The Legislature has provided $2 million for a consultant to be hired to assist AHCA in presenting the expansion waiver request to CMS.

Putting aside whether there is any certainty of long-range budgetary benefits by moving nearly all Medicaid beneficiaries into for-profit managed care plans, there is no technical basis in terms of encounter data upon which to rely for mandating dual eligibles (seniors with Medicare and Medicaid) who need long-term care to be included within the expansion. In fact, the pilot project specifically excluded this needs-sensitive population group, so there is no data upon which AHCA can justify its request. Consequently, the position of the El-

der Law Section is to oppose inclusion of dual eligibles at this time and to request CMS to deny AHCA's inclusion of dual eligibles in its amendment.

This lack of encounter data is but one major concern. Another such concern worthy of mention for the legal scholar, codified in the new statutory language of Fla. Stat. 409.983(5), seems to imply monetary incentives are to be paid to managed care plans for reducing institutional placements and increasing the use of home and community-based services. Although home and community-based services are ideal for a senior who has the ability to be safe and secure in less restrictive settings, there is an eligibility component hindering realization of this ideal. It is found in the creation of Fla. Stat. 409.979(3), which requires eligibility for enrollment to be based on wait-list prioritization and subject to availability of funds.

Unfortunately, seniors have been relegated to wait lists throughout the state of Florida for home and community-based services, in some cases for over a full year. Due to budgetary constraints, those wait lists have grown to as high as 40,000, according to the Department of Elder Affairs. So, how can these two new statutory provisions be reconciled? Will the incentives be paid when the senior is "de-institutionalized" but still cannot receive home and community-based services due to waiting lists and unavailability of funds?

In summary, the legislation, which provides the foundation for AHCA's request, contains many provisions that create significant concerns for seniors and their advocates, concerns that cannot be covered in this report alone.

Resident/Facility Rights Special Committee

Aubrey E. Posey and Laurie E. Ohall, co-chairs

The Resident/Facility Rights Special Committee's primary purpose is to inform elder law attorneys about issues pertaining to our clients' rights when they are admitted to long-term care facilities, including nursing homes, assisted living facilities and adult family-care homes. We monitor any bills being introduced in the Florida Legislature that may affect residents' rights in long-term care settings. We also follow cases pending in the District Courts of Appeal and the Florida Supreme Court dealing with residents' rights issues that may necessitate intervening via amicus curiae briefs.

Unlicensed Practice of Law Special Committee

John R. Frazier, chair

The Elder Law Section Unlicensed Practice of Law Special Committee has five committee members. The committee holds a monthly teleconference on the third Tuesday of every month at 4 p.m. Since our last report, our committee has submitted an outline to The Florida Bar summarizing our concerns regarding UPL. The Florida Bar has submitted our outline to The Florida Bar Standing Committee for UPL to be used as guidance for a proposed Florida Supreme Court UPL advisory opinion. Along with the outline, our committee submitted sample drafts of a qualified income trust and a personal service contract to the UPL Standing Committee to assist the committee in making a determination as to what may constitute UPL in the context of Medicaid planning. The UPL Committee will continue to write publications to increase awareness of the UPL problem in Florida, and the committee will continue to encourage and facilitate the filing of UPL complaints with The Florida Bar.

Surety Title Insurance Agency Inc. v. Virginia State Bar, 571 F.2d 205 (4th Cir. 1978)

A legal reason why The Florida Bar's UPL investigative process is 'complaint driven'

by John R. Frazier, chair, Unlicensed Practice of Law Special Committee

In the above referenced case, the United States District Court for the Eastern District of Virginia found in favor of the plaintiff, Surety Title Insurance Agency Inc., and against the defendant, the Virginia State Bar, regarding a federal antitrust claim. The court held that the actions by the Virginia State Bar were in violation of federal laws that prohibit the restraint of commerce. In deciding the case, the court did not determine that the Virginia State Bar lacked the authority to define, investigate or regulate the unlicensed practice of law. Rather, the court held that the procedures the Virginia State Bar followed in its efforts to regulate the unlicensed practice of law in Virginia violated federal antitrust laws. Accordingly, this case is a legal reason why the investigation of alleged UPL activity in Florida is a "complaint driven" process. In order for The Florida Bar to commence with the investigation of an allegation of UPL, the filing of a UPL complaint with The Florida Bar is a critical element in that process.

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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No repeat of Hurricane Katrina for Florida elders!

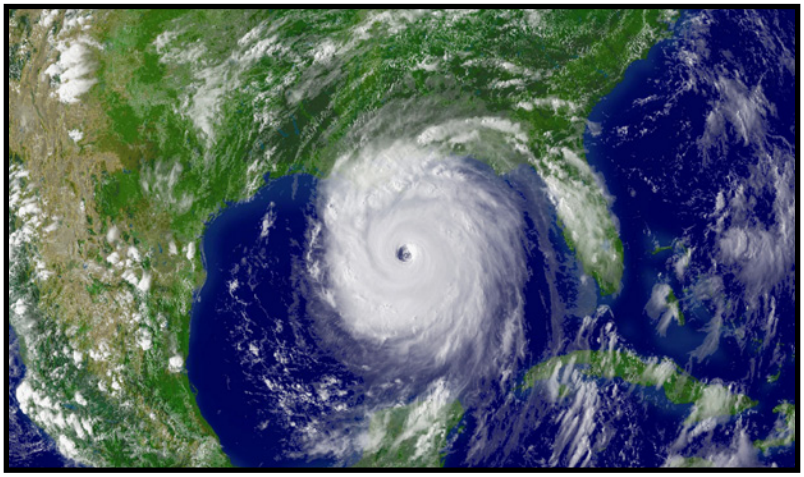
Hurricane preparedness for loved ones with special needs

by Shannon Martin

Emergency planning is vital for all of us who live and do business in Florida, but especially dire for individuals who are frail or suffer from chronic conditions or limited mobility. We are fortunate in hurricane-prone areas to be able to plan ahead in general for the season as well as to have warning of likely storms approaching. For hurricane preparedness checklists you can share with special needs clients and their family members, visit *www.agingwisely.com* and *www.easylivingfl.com*. We also offer special tips about considerations for individuals with Alzheimer's disease and their caregivers.

Some important pointers for families and caregivers when preparing for the safety of someone with special needs:

- Get an emergency supply of medications. Here is some information for Medicare recipients about getting medications and care during emergencies: *http://www.alz.org/safety-center/getcare_disaster.pdf*.
- Be realistic about the person's ability to self-preserve in a storm situation at home alone. Talk to your loved one about your concerns, and discuss options for possible evacuation or alternative stays (at receiving care facilities, with a family friend, etc.). For situations in which one spouse or family member is caregiver for another, also consider the challenges that may arise during/after a storm. While a competent person may refuse to evacuate, it may help to specify concerns and offer alternatives. A care manager can help to assess risks and options.
- Consider how a storm's effects will impact your loved one in ways they might not affect a healthy adult. Even a minor storm may disrupt electricity and other infrastructure, and residents may have to manage without electricity, water and other resources for some time. You can imagine the impact this would have on someone, for example, with a respiratory ailment or incontinence. Stress and lack of services can also make the time after a storm very difficult. For a person with Alzheimer's disease, the stress, lack of lights and changes in routine can cause great anxiety.
- Special needs shelters are last-resort options for evacuating.
- Make sure any elderly or disabled loved ones are registered with the county's emergency services. Remember that emergency personnel may not be available as the storm nears, so if a person refuses to evacuate, he or she cannot expect last minute assistance.
- Take into account your loved one's special needs in evacuation planning, and evacuate early when necessary. What equipment must be brought along? How will the person cope if stuck in a car in traffic for long periods?
- Make a list of key contacts you can include in your evacuation kit and/or for families at a distance, along with a basic medical history and list of medications.
- If you rely on home caregivers for help, find out about the agency's plan. Discuss availability of staff, what you can expect and rates/arrangements. Individuals with a private caregiver should be especially cautious about how they will manage if the caregiver cannot assist, as well as realistic about how difficult the situation may become.
- For those residing in care facilities, ask to review the required disaster plan and communications plan/contact information.



Satellite view of Hurricane Katrina, August 2005 (Google Images)

***Shannon Martin, M.S.W., CMC**, is director of communications for EasyLiving home care (*www.easylivingfl.com, HHA#299992282*) and Aging Wisely geriatric & disability care management (*www.agingwisely.com*). Aging Wisely offers care management assessments, along with specific hurricane planning packages, and EasyLiving can help clients shop for supplies and prepare emergency kits.*

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‘Down syndrome’ now included under definition of ‘developmental disability’

by Emma Hemness, co-chair, Medicaid Committee

E. HEMNESS

Up until the passage of House Bill 7109, the complement to House Bill 7107 seeking to mandate enrollment of nearly all Medicaid beneficiaries statewide into managed care plans, Down syndrome was not specifically identified within the category of “developmental disability” under Fla. Stat. 393.063. Only those disorders or syndromes attributable to retardation, cerebral palsy, autism, spina bifida or Prader-Willi syndrome were specifically identified. The problem presented was that a person with Down syndrome would not be considered as having a developmental disability if he or she was not also mentally retarded, which many persons with the condition are not. Consequently, if a person with Down syndrome desired to access certain benefits programs, he or she would have to qualify by falling below the level of mental function for “retardation.” This created an artificial barrier for persons with Down syndrome who were not de facto mentally retarded as per the definition under the statute, thereby excluding them from accessing benefits. For example, the Agency for Persons with Disabilities only serves persons with developmental disabilities, and access to services under the Developmental Disability Medicaid Waiver was also out of reach for these individuals.

Pursuant to this legislation, Down syndrome in now included under the definition of “developmental disability” with this change to Fla. Stat. 393.063, effective July 1, 2011. As mentioned above, this opens the door for persons with Down syndrome to be technically eligible for governmental benefits programs, irrespective of whether or not years-long waiting lists exist for these programs.

One of the opportunities that has resulted from this statutory change, accessible in most areas of the state, is the ability to obtain a guardian advocate for persons with Down syndrome if such appointment is warranted in all respects. The appointment of a guardian advocate for a person with developmental disabilities is codified in Fla. Stat. 393.12, which specifically does not require an adjudication of incapacity as in more formal proceedings for guardianship under Fla. Stat. 744 et seq. Unfortunately, in a very few judicial circuits, the process described under Fla. Stat. 393.12 is still considered without appropriate regard. This, in turn, diminishes the benefit to a person with developmental disabilities that could be achieved through the appointment of a guardian advocate, such benefits to include the avoidance or minimization of attorney’s fees, examining committee fees and court costs, as well as the more intangible savings resulting from judicial economy.

Emma Hemness *is a past chair of the Elder Law Section (2007-2008) and co-chair of the ELS Medicaid Committee. She practices elder law near Tampa in Brandon, Fla. She is a certified elder law attorney and Florida board certified in elder law.*

Call for papers – *Florida Bar Journal*

Enrique Zamora is the contact person for publications for the Executive Council of the Elder Law Section. Please email Enrique at *ezamora@zhlaw.net* for information on submitting elder law articles to The Florida Bar Journal for 2012. A summary of the requirements follows:

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

New Florida Power of Attorney Act leaves out professional guardians

by Jean M. Finks

J. FINKS

The new Florida Power of Attorney Act takes effect Oct. 1, 2011. One section appears to be misguided. New Section 709.2112 restricts compensation only to those who meet the definition of "qualified agents," the new moniker for "attorneys in fact." Those "qualified" include spouses, heirs of the principal, Florida attorneys and certified public accountants, financial institutions with trust powers and a situs in Florida, and amateurs who are Florida residents with fewer than three other principals. Guess who is not included? Florida professional guardians.

The legislative intent for Chapter 744 mandates that we "make available the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs" (Section 744.1012, Florida Guardianship Law). Not all Floridians are of high net worth, nor do they need or can they afford a trust or a trust officer to act for them. Not all need a court guardian. But many need help with tasks that immobility or other limitations make difficult. In situations either where there is no family member who can serve, or when our clients don't choose a family member to serve, a very helpful and cost-effective alternative to guardianship is to find a local professional guardian who through a durable power of attorney can manage accounts and personal services for those still mentally capable. Such services involve time and money in most cases, but this law will prohibit such arrangements.

Each Florida professional guardian has already gone through extensive education, testing and a criminal background search, and like lawyers and other professionals, each must meet continuing education requirements to stay current. Each must be bonded. They are not just neighbors or well-meaning friends. Status as a current professional guardian can be verified with the Statewide Public Guardianship Office within the Department of Elder of Affairs to assure clients they are or will be in good hands.

Even though a professional guardian would be acting outside the scope of regulation or court oversight in acting under a durable power of attorney, there would be strong disincentives to jeopardize his or her professional guardianship status by violating the client's trust.

There appears to be no reference to "qualified agents" in the uniform power of attorney statute that was supposedly an impetus for the change in our state's law. The staff analysis report for the House of Representatives' companion bill HB 815 estimated that the new law's direct economic impact on the private sector will be "none." This estimate is unrealistic, and the new law will impair judicial economy by forcing many partially impaired clients to resort to more expensive and more restrictive methods to gain assistance when they are forbidden to pay reliable agents not authorized by the new law to be paid.

The Chapter 709 White Paper prepared by a consortium of interested persons reflects a clear bias toward financial institutions. "The concern is that such a provision" [to disallow compensation to those not meeting the statutory definition of qualified agent] "would encourage and facilitate an industry in which unlicensed and unregulated individuals would serve as agents for profit."

I respectfully suggest that the most common bad actors toward vulnerable adults relying on a durable power of attorney to protect them are not the already regulated professional guardians, whose duties frequently outlast their clients' financial resources. Rather, they are more likely to be a family member, neighbor or friend who starts out helping, but becomes tempted. Or even the unscrupulous few who attempt to set up unregistered trust companies. Yet the new law grants safe harbor to some foxes while it inhibits professional guardians from assisting those who have found a simpler solution that works.

Jean M. Finks *attended Cornell College in Iowa. After early work in publishing and food warehousing in the Chicago area, she and her husband, Keith, came to DeLand, Fla., in 1978. Work as a probate and guardianship paralegal led to law school. Finks graduated with honors from FSU College of Law in December 1989. After working for E. David Johnson, she formed her solo firm in 1996, with emphasis on estate planning, probate, guardianship and residential real estate transactions. She is a past president of the Charlotte County Estate Planning Council and the Charlotte Chorale and is former chancellor for her church. She served on the Probate Rules Committee for two terms. Finks received The Florida Bar Pro Bono Award for the 20th Circuit in 2009. She has taught the family guardianship class for Charlotte County for the past seven years.*

Long-term care insurance:
New options for premium payment and Medicaid planning

by Carrie M. Fouchia


C. FOUCHIA

As elder law practitioners, it is imperative that we advise our clients on all the options and tools available to them to complete their estate plans. One of those options is long-term care insurance. With recent changes to Florida's policies under the Deficit Reduction and the Pension Protection Acts, long-term care insurance (LTCI) is steadily becoming an increasingly attractive product that can help achieve asset protection and peace of mind.

According to the National Academy of Elder Law Attorneys, the risks of financial devastation brought on by a major car accident or a house fire are 1 in 240 and 1 in 1,200, respectively. Accordingly, automobile and homeowner's insurance are policies that most people carry, often paying higher premiums for increased protection over and above what is required by state law or other regulations. In contrast, the chance of financial devastation due to long-term care needs is about 1 in 2. And yet LTCI policies continue to be difficult to sell to qualified individuals.

As Florida continues to implement the Deficit Reduction Act through rule adoption, transmittal letters and changes to the Medicaid Policy Manual, LTCI becomes more and more useful as a tool for Medicaid planning. One of the recent changes allowed for the implementation of partnership policies. These policies permit an individual to claim as exempt from Medicaid consideration assets equal to the amount of the total payout of benefits from the policy, known as the "benefit-offset." Thus, if an individual purchases a policy that pays out $100,000 in benefits, once those benefits are exhausted and the person otherwise qualifies for Medicaid, $100,000 is considered an exempt asset, in addition to the individual and spousal allowances already considered non-countable. The estate planning practitioner should be aware that not all states offer reciprocity for partnership policies purchased in other states, and a pending relocation can impact the benefit-offset and undermine the asset protection.

Paying for LTCI has recently become more advantageous from a tax standpoint as well. Since Jan. 1, 2007, under the Pension Protection Act of 2006 (PPA), premiums for LTCI policies can be paid directly from certain governmental retirement plans with pre-tax dollars. Another way to cover premiums if an individual does not qualify for the governmental retirement plans is to purchase a hybrid annuity to fund the LTCI costs. These annuities are fixed single premium deferred annuities with long-term care insurance riders. Under the PPA, and effective Jan. 1, 2010, charges against the annuity value to cover the premiums are not considered taxable distributions. When advising clients on the benefits of these annuities, information should be given regarding the drawbacks of annuitizing assets for long-term care planning, including surrender charges or tax penalties and beneficiary and estate recovery requirements. However, even with these potentially negative aspects, the tax-saving provisions open up the LTCI market to a larger number of individuals.

As the baby boomers are entering their retirement years and the average age of our population continues to rise, the statistics regarding the need for long-term care can no longer be ignored. *The Wall Street Journal* stated that for a couple turning age 65, there is a 75 percent chance that at least one of them will need some kind of long-term care. To avoid the probable financial devastation associated with long-term care, LTCI should be a tool that every estate planning practitioner relies on when advising clients how to protect assets, preserve inheritances and ensure the best level of care, if and when the time for long-term care arrives.

Carrie M. Fouchia *received her B.S. degree from Western Carolina University in 2003 and her law degree from Florida State University's College of Law in 2007, and was admitted to practice in Florida the same year. She is an associate attorney with Olmsted & Wilson PA, which focuses its practice in the areas of real estate law, wills, trusts, estates, guardianship, elder law and business law.*

Using IRS Form 56-Notice Concerning Fiduciary Relationship as a tool

All elder lawyers should be familiar with IRS Form 56-Notice Concerning Fiduciary Relationship. This form is used by a fiduciary to notify the Internal Revenue Service that he or she is acting on another person's behalf. For our purposes, person includes an individual, trust or estate, and the term fiduciary includes guardians, executors (personal representatives), trustees, etc. This form tells the IRS that the fiduciary is to receive IRS notices regarding various taxes and forms pertaining to the person or entity for which the fiduciary is acting.

On a number of occasions, the author has received a case from an elder lawyer when the client owes federal taxes. While no formal guardian has been appointed, often someone has been acting as the power of attorney for the client for some time. However, the IRS has sent notices only to the client because the IRS does not know that the power of attorney was acting for the client/taxpayer. The client/taxpayer ignores, loses or hides the notices, and therefore, the power of attorney does not see the notices until after critical deadlines have passed.

Had Form 56 been filed as soon as the power of attorney started acting, even if the client still had some capacity, the notices would have been timely seen by the power of attorney and could have been brought to the attorney's attention promptly. This allows more options in addressing the tax matter. Consider using Form 56 in appropriate circumstances, even if there is not a formal guardianship, estate or trust.

Online application for Employer Identification Number—avoid the recordkeeping trap

Most elder law attorneys know that Employer Identification Numbers can be obtained online. Recently, the author was assisting in settling the estate of a parent of a very qualified elder lawyer. The lawyer questioned why we needed to have a signed IRS Form SS-4 (Application for Employer Identification Number-EIN), when we were just obtaining the estate/trust EIN "online."

It is important to remember that if a third party designee (such as the elder lawyer) is completing the online application on behalf of the taxpayer (such as an estate and/or trust), the taxpayer must authorize the third party to apply for and receive the EIN on the taxpayer's behalf. The taxpayer must sign a completed Form SS-4, including the third party designee section, prior to the third party making the online application. A copy of the signed Form SS-4 must be retained in the third party's files. The taxpayer must read and sign a statement that he or she understands that he or she is authorizing the third party to apply for and receive the EIN on his or her behalf and to answer questions about completion of the form. Fortunately this language is already on the SS-4. A copy of the signed statement (the SS-4) must be retained in the third party's files.

TAX TIPS

Michael A. Lampert

Besides the basic requirement to follow the rules, what happens if the "client" becomes disgruntled with the attorney and complains that the attorney had no authority to obtain the number? Without the signed SS-4, the attorney is at risk. Have the SS-4 signed with the third party designee filled in on the form, and keep the form in your files.

Accounts owned by foreigners

With all of the publicity over the increasing enforcement of unreported offshore financial accounts, it is easy to confuse accounts that should be reported with those that do not require reporting or the payment of U.S. income tax. In addition, these very same accounts might not be included in the determination of U.S. federal estate tax.

As a general rule, U.S. citizens and permanent residents (U.S. persons) are required to report their worldwide income. Not all of this income may ultimately result in U.S. income tax. For example, various treaties apply and credit may be given for taxes paid to a foreign government. Likewise, at death, U.S. citizens and permanent residents are subject to estate tax on their worldwide assets, again subject to some special rules, such as applicable treaties.

But what about a non-U.S. citizen/non-domiciliary (who was never a U.S. citizen) with assets in the United States? What about a non-U.S. citizen/non-domiciliary with non-U.S. assets who gifts those assets during his or her lifetime or leaves them at death to a U.S. person?

While a complete discussion of all of the tax laws regarding the taxation of a non-citizen/non-domiciliary is beyond the scope of this article, it is helpful to understand some of the basic concepts. A non-U.S. citizen/non-domiciliary can gift or bequeath any amount of non-U.S. situs assets to a U.S. person. For a non-U.S. citizen/non-domiciliary, only U.S. situs assets are subject to U.S. estate and gift tax.

United States situs assets, with some exceptions, include stock in U.S. corporations, tangible personal property and real property located in the

O.K., so you avoided probate, but what about the creditors?

The tale

Many of our clients are inundated with information about probate avoidance through the use of trusts. Tales are told of probate horror stories with the result that many Florida residents have a revocable living trust. However, upon the death of the grantor, the successor trustees are usually horrified to learn they and the trust beneficiaries can potentially remain personally liable to any creditors of the grantor for up to two years to the extent there are assets in the trust. Suggesting a formal administration to deal with potential creditors only elicits moans of disbelief from the beneficiaries: "But mom set up the trust to avoid probate!"

The tip

Fortunately, the summary probate with a publication of a notice to creditors can solve this dilemma. There is almost always at least one asset left out of the trust. Even if no assets have been left out of the trust, just about anything can be used to run a summary administration. Items such as cash, personal property, car, homestead, etc., are ideal for this purpose. Obviously, you can deal upfront with the known and reasonably ascertainable creditors. The summary administration form (FLSSI form P2.0205 or 2.0215), F.S. 735.206(2) and Probate Rule 5.530 all provide for a list of the known creditors and how they will be paid to be contained in the petition for summary administration. It is the unknown creditors that pose the problem.

Tips & Tales

Kara Evans

F.S. 735.2063 specifically allows any person who has obtained an order of summary administration to publish a notice to creditors tailored specifically for a summary administration (FLSSI Form P-2.0355). The notice must state that an order of summary administration has been entered by the court. The notice must also "specify the total value of the estate and the names and addresses of those to whom it has been assigned by the order." If the proof of publication is then filed with the court, all claims not filed within three months after the first publication of the notice "shall be forever barred."

One practice tip: Be sure the beneficiaries understand that their names, addresses and how much they will receive will be included in the publication. They may want to pursue a formal administration after all!

Kara Evans *is a sole practitioner in the Tampa Bay area. She is board certified in elder law, a member of the Florida and New York Bar Associations and has a master's degree in taxation.*

Tax tips

from preceding page

United States, and bonds and other debt instruments issued by U.S. persons. Exceptions from U.S. situs status exist for certain debt instruments issued by U.S. persons and deposit accounts held in a U.S. bank or savings and loan association (not a brokerage account). For this reason, non-citizens/non-domiciliaries often use offshore entities to hold U.S. situs assets.

The gift tax rules are a bit different. While the determination of being a U.S. domicile is the same, what is taxed as U.S. situs assets is different. For gift tax purposes, intangible assets such as stock in U.S. corporations and U.S. debt obligations are generally not considered U.S. situs assets. Thus, a non-domiciliary can gift these assets to a U.S. person without gift taxes, even though the assets may be subject to estate tax if owned by that same non-domiciliary at death.

Care should be taken in considering and differentiating the reporting and tax consequences between U.S. persons and "foreigners." The tax and reporting requirements are very different.

Michael A. Lampert *is a board certified tax lawyer and chair-elect 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.*

IRA beneficiary designations to third party special needs trusts Charitable remainder beneficiary issues

by David E. Moule

An IRA is commonly one of an individual's most valuable assets at the time of death. The elder law attorney frequently encounters a situation where a client wishes to leave an IRA to a disabled heir. The disabled heir may already be receiving or may someday receive needs-based government benefits. Preservation of these existing needs-based benefits or preservation of the ability to receive these needs-based government benefits in the future leads the elder law attorney, of course, to draft a third party special needs trust. Special consideration should be given if an IRA, or even a portion thereof, is to be included as part of the SNT.

One must be mindful of the definition of designated beneficiary relative to IRAs. Only a designated beneficiary can (and is required) to take minimum required distributions (MRD) over his or her life expectancy. This is also known as a "stretch" payout and will most likely result in substantial tax savings over the life of the disabled beneficiary. If the beneficiary of the IRA is not an individual, a group of individuals or a "see-through" trust, the IRA is considered not to have a designated beneficiary, and it must be distributed completely within five years if the participant died before the required beginning date (generally the year in which the participant turned age 70-1/2) or over the participant's life expectancy if the participant died after the required beginning date.

All distributions from an IRA are considered income to the recipient. If the recipient is a trust, income from the IRA will be subject to trust tax brackets, which are much lower and more compressed than those for an individual. Therefore, in most cases, it is crucial to have the SNT qualify as a "see-through" trust to avoid the IRA from having to be paid within five years or over the life expectancy of the deceased participant so as to preserve as much IRA assets for the disabled beneficiary as possible.

To qualify as a "see-through" trust, all of the following factors must be met:

1. The trust must be valid under state law;
2. The trust must be irrevocable or will become irrevocable upon the death of the participant;
3. The beneficiary of the trust must be identifiable from the trust document;
4. The IRA's plan administrator must receive timely notice of certain documentation; and
5. All of the trust's beneficiaries must be individuals.

The most common issue encountered with the above is what to do with the remainder beneficiary of the SNT because the remainder beneficiary must be an individual or individuals to qualify the trust as "see-through." Frequently the client will ask that the remainder be left to charity, especially if the disabled heir is an only child. However, a charity is not an individual and will disqualify the trust from receiving "see-through" status. The result of leaving a remainder to charity would depend on the participant's age at death. If the participant died after the required beginning date, the SNT would have to take the IRA distributions as income over the deceased participant's life expectancy (generally much shorter than the disabled heir's life expectancy, based on IRS tables). If the participant died before the required beginning date, the SNT would have to take the IRA as income within a five-year period.

Further complicating matters, if the remainder beneficiary of the SNT is older than the beneficiary for whom the SNT was created, the SNT must take MRDs over the remainder beneficiary's life expectancy. This creates a difficult situation when the planning being done is for an only child and there is no logical, individual remainder beneficiary. In that case, absent naming a child's friend as the remainder beneficiary, this author has found no good solution. Of course, if the disabled heir has a sibling close in age, naming that sibling as remainder beneficiary would cause the SNT to take the IRA as income over the oldest named sibling's life expectancy (not necessarily the current income beneficiary's!), thereby alleviating the problem.

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Summary of selected caselaw

by Diane Zuckerman

Overbroad or unduly burdensome discovery

Roger Bogert, as attorney in fact, for Dorothy Walther, Petitioner, v. Patrick Walther, as Trustee, Case No. 5D10-3336 (5th DCA, 2011)

Bogert, who was agent for his sister, sought certiorari review to quash a discovery order requiring the production of financial and medical records of Dorothy Walther. Mrs. Walther was a beneficiary of a trust created by her husband. The respondent, her son, served as trustee.

The underlying lawsuit was filed by the respondent for payment of attorney's fees from the trust property. The respondent served discovery on the petitioner consisting of interrogatories and a subpoena duces tecum for deposition of an account manager from a security brokerage. The subpoena requested production of Dorothy Walther's account statements for a three-year period beginning in 2006. The petitioner objected to the discovery, and the respondent filed a motion to compel. The scope of the motion to compel exceeded the scope of the initial discovery and sought to compel production of "Dorothy Waller's financial records from 2006 to the present" and "all documents which would provide a reasonable basis to conclude a breach of trust had occurred."

At the hearing on the motion to compel, the trial court overruled the petitioner's objections to discovery. It ordered the petitioner to produce 1) Dorothy Walther's personal financial records in her custody, control and possession; 2) a signed authorization to obtain financial records not in her possession; 3) all records from all of Dorothy Walther's accounts for the prior 10 years; 4) all documentary evidence in her custody or possession supporting the claim of breach of trust; and 5) any and all medical records relating to Dorothy Walther's general health and competency in her care, custody or control.

The standard for certiorari review for quashing discovery orders is whether the order departs from the essential requirements of the law and causes irreparable harm that cannot be remedied on appeal. The Fifth District granted the writ and quashed the trial court order, reasoning that it required voluminous production of discovery well beyond what was initially requested by the respondent. For example, the trial court's order required production of financial records for a greater time period than the initial discovery, and the term "personal financial records" was vague. Further, the Fifth District noted that the trial court's order for production of medical records had no limitation of a time period. In conclusion, the court ruled that the discovery order required documents that were never requested by a party and were likely not relevant to any issues in the lawsuit.

This case shows that discovery orders that are overbroad, vague or unduly burdensome can be successfully challenged by certiorari review.

Insufficient assets to cover devises

Cecilia Reid, Appellant, v. In Re: Estate of Edgar Sonder, Appellee (3rd DCA, 2011)

Cecilia Reid, the trustee of the Edgar Sonder Trust, appealed an order denying her amended petition for reformation of the trust. The facts revealed that Sonder had executed a trust naming himself as trustee on May 17, 2000. Reid was named as successor trustee. The trust was funded by the assets that poured over from the estate. The relevant provisions in the trust consisted of Article II, paragraph 1, titled "Pecuniary Gifts," which gave a total of $31,000 to 10 charities. Paragraph 2, titled "Endowment Gift," provided that "after the gift in paragraph 1, directly above," $125,000 was to be paid to the Hebrew Union College Jewish Institute of Religion. Article 11, paragraph 3, titled "Pecuniary Gifts to Individuals," provided that after giving "gifts in paragraphs 1 and 2 above," several gifts to enumerated persons were to be made, including a gift of $25,000 and an apartment to the appellant Reid.

Sonder died on May 12, 2005, and his wills and codicils were admitted to probate. The appellant Reid was appointed his personal representative. Upon finding there were insufficient funds for gifts in the trust's Article II, paragraphs 1, 2 and 3, Reid moved to abate the pecuniary gifts proportionately. In a separate action, Reid argued that the apartment was not subject to abatement. The motion to abate was denied and affirmed by the Third DCA in *Reid v. Hebrew Union College-Jewish Institute of Religion*, 947 So. 2d. 1178 (Fla. 3d. DCA 2007).

Thereafter, Reid petitioned to reform the trust, claiming that the trust instrument did not evidence the settlor's intent, which was to give his apartment to Reid, not subject to abatement.

The Third District recognized that a trust with testamentary aspects may be reformed after the death of the settlor, if there is a unilateral drafting error, as long as the reformation is not contrary to the settlor's intent. However, the person seeking reformation has the burden of proving by clear and convincing evidence that the trust does not reflect the settlor's intent. The court explained that this standard is midway between the preponderance of evidence standard in civil cases and beyond a reasonable doubt standard in criminal cases.

The court then addressed the evidence presented before the probate court, which consisted of the testimony of the drafting attorney. He testified that it was his and not the settlor's choice to use the language "after giving effect to" in paragraphs 2 and 3. However, he also testified

continued, next page

that the settlor had read the trust and had approved the language. The court also noted that the settlor was an astute businessman and therefore capable of understanding the trust as written. The court agreed with the probate court that the appellant had not met the burden of proving by clear and convincing evidence that the settlor's preference was to give the apartment before the endowment in the event both gifts could not be satisfied. Therefore, the Third District affirmed the trial court's ruling.

The import of this case is how the enhanced legal burden of clear and convincing evidence can affect the outcome of litigation. Additionally, it provides a reminder for the attorney to talk with the client about his or her intent should there be insufficient assets to cover the gifts.

Fla. Stat. 736.6005(2)

Laurie Basile and Leanne Krajewski, Appellants, v. James Michael Aldrich, In Re: Estate of Ann Dunn Aldrich, Appellee (1st DCA, 2011)

This case interpreted a will that left specific devises to a beneficiary, but did not contain a residuary clause. The decedent had prepared an E-Z legal form, and under Article III, titled "Bequests," she itemized specific gifts. They included her home, a Fidelity IRA, a life insurance policy, a vehicle and specified bank accounts with account numbers. All were to be given to her sister, and if her sister predeceased her, then to her brother James Michael Aldrich. There was no residuary clause. The appellants, two nieces, were not mentioned in the will.

The decedent's sister passed away before the decedent, and per her sister's will, the decedent inherited some real property and cash. The decedent never amended her will to include this newly acquired property.

The nieces argued that the will should be constructed, in the absence of a residuary clause, so that only the specific devises in the will would pass to the named beneficiaries. They contended that the newly acquired property, not devised in the will, should pass intestate. Under the intestacy statute, a portion of the property would descend to the nieces.

Aldrich argued in accordance with Fla. Stat. 732.6005(2) that a will should be construed to include property that is owned upon death. He also argued that only he and the sister were named in the will, which evidenced the intent that all property go to either.

The court noted that the crux of the nieces' argument was that Fla. Stat. 732.6005(2) did not apply to wills that did not contain a residuary clause. In support of its ruling for the appellee Aldrich, the First District analyzed the statute's history and case law. The analysis yielded consistent legal support for the proposition that wills were to be interpreted to include after-acquired property. They rejected the exemption argument advanced by the nieces. The court further noted that the decedent's intent to give specific property to her sister and brother as successor beneficiary manifested an intent to give all her property to them.

This case presents a cautionary tale of what can happen when a will is prepared without the assistance of an attorney, who likely would have advised including a residuary clause.

Preference of personal representative

Douglas Stalley, Appellant, v. Harrison Williford, as Representative of the Estate of Pamela Lynn Williford, Deceased, Case No. 2D09-4635 (2nd DCA, 2010)

This case applies Fla. Stat. 733.301,

which provides for the preference in appointment of personal representatives. Pamela Lynn Williford died leaving two minor children as the sole heirs of her intestate estate. The children's guardian sought to have a professional fiduciary, Douglas Stalley, appointed as the personal representative. The decedent's father also petitioned for appointment as personal representative and was appointed by the probate court. Stalley appealed. The court cited Fla. Stat. 733.301 as the applicable statute that addresses the order of preference for appointment of personal representative in an intestate estate. The preference is as follows:

- The surviving spouse
- The person selected by a majority in interest of the heirs
- The heir nearest in degree

Noting that the children, through their guardians, had selected Stalley, the court ruled that he would have preference under the statute. The Second DCA found that the court had abused its discretion by appointing the decedent's father as personal representative.

Exploitation of the elderly

Dana Lynn Guarscio, Appellant, v. State of Florida, Appellee, Case No. 2D08-5000 (2nd DCA, 2011)

Dana Guarscio was convicted of exploiting an elderly person, grand theft of a person over age 65 and four counts of uttering a forged instrument. The victim was Guarscio's grandmother, who had purchased a home with a mortgage debt of $47,000. Garscio lived there with her son. Over an 18-month period, the house was refinanced three times, increasing the mortgage debt to about $100,000. Proceeds from the equity loan were used to pay for Guarscio's wedding and a new painting business she had with her husband.

In November 2005, the grandmother suffered a stroke. Guarscio was her grandmother's health care surrogate and was named her power of attorney under a springing clause, which needed two physicians to determine the grandmother's incapacity. The grandmother was admitted to a nursing home, where a social worker became concerned for her welfare. A voluntary guardianship with a professional guardian was arranged. The guardian notified Guarscio by mail that the power of attorney had been revoked by the guardianship and that no checks should be written on her grandmother's bank account. Evidence showed that Guarscio had written four checks on her grandmother's account after she had suffered the stroke. After the stroke, the house went into foreclosure. Based on the guardian's investigation, the state brought criminal charges against Guarscio.

The fourth amended information charged Guarscio with violation of Section 825.103(1)(a) and (2)(a), which states in pertinent part:

> (1) Exploitation of an elderly person or disabled adult means:
>
> *(a) Knowingly, by deception or intimidation, obtaining or using, or endeavoring to obtain or use, an elderly person's or disabled adult's funds, assets, or property, with the intent to temporarily or permanently deprive the elderly person or disabled person of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who:*
>
> *1. Stands in a position of trust and confidence of the elderly person or disabled adult.*

In reversing the conviction of this count, the court concluded that although the State proved the refinancing of the home and money spent on Guarscio, there was no evidence that the refinancing was obtained by deception or intimidation. Reversal of the conviction was based on the State failing to prove this element of the crime. The conviction of the four counts of the unauthorized checks was upheld. The conviction of grand theft based on checks written before the stroke was reduced to a third degree felony.

Criminal exploitation of the elderly is a continuing problem in Florida. It is helpful to know the state attorneys are prosecuting these crimes.

Fair Hearings Reported

by Katrina M. Thomas

Petitioner v. Respondent, Appeal No. 09F-03487 (Aug. 5, 2009)

The petitioner suffers from a seizure disorder, microcephaly, aspiration, severe developmental delay and blindness, and has an increased risk for failure to thrive. The petitioner receives Supplemental Security Income (SSI) and SSI-related Medicaid, and began receiving Prescribed Pediatric Extended Care (PPEC) under state-plan Medicaid.

At issue is the respondent's action to decrease the PPEC to only full time when school is not in session, which decrease was based upon the respondent's finding that the caregivers are available to provide care. The petitioner had previously received PPEC part time on school days, after school.

The petitioner's grandmother is the primary caregiver, and the petitioner resides with his maternal grandmother, grandfather and uncles aged 19 and 21. The grandparents are self-employed in a lawn and garden service business. Based on observations made during an unannounced home visit where one uncle was napping and the grandmother expressed that she wished to plant flowers in the yard, the respondent determined that PPEC services were being used for

continued, next page

"respite" care, which is not a covered service under Medicaid. Accordingly, PPEC was reduced. The petitioner argued that planting was part of her landscape business and that if the child was at home, the petitioner would miss calls and that would have negative results for the business.

The evidence did not show support of the respondent's position that there was not a medical necessity for the PPEC other than the respondent's belief that the caretaker is available to provide for the petitioner on at least a part-time basis after school. Given that evidence, the petitioner was found to not be using PPEC services for "respite," but rather was involved in work activities related to the family business. Appeal granted and the respondent's action is reversed.

Petitioner v. Respondent, Appeal No. 09N-00105 (Sept. 21, 2009)

The petitioner entered a nursing facility in April 2006 following a series of strokes and after nursing home placement was medically ordered. The petitioner requires specialized care, is lucid and alert, and does not speak English. Before her first stroke, the petitioner was employed, had medical insurance and was working toward obtaining legal residency status. However, once she became ill and was admitted to the nursing facility, she lost her insurance and her citizenship naturalization process was halted.

The petitioner's Institutional Care Program (ICP) Medicaid coverage was cancelled during 2008 due to the respondent's determination of citizenship ineligibility. By June 2009, the amount owed for nursing home care was $83,426.96. The facility issued a nursing home transfer and discharge notice to the petitioner due to nonpayment, and the location for discharge was the niece's home with home health aide assistance.

The petitioner's family testified that the niece's home is inadequate for the petitioner, given that the niece resides in a second-story walkup and is absent from the home at least 10 hours a day. The petitioner is concerned her health will suffer and that she will be deported due to her family's inability to provide care to her upon discharge.

There are a number of requirements to effectuate a valid transfer and discharge. Here, because serious payment delinquency exists, reasonable and appropriate notice to pay was issued by the respondent and inadequate payment was made following such notice, discharge was appropriate and met the requirements thereof. Appeal denied.

Petitioner v. Respondent, Appeal No. 09N-00212 (April 5, 2010)

The petitioner, 89, was admitted to the respondent facility in May 2008. On Dec. 10, 2009, the respondent issued written notice of discharge because the safety of other individuals was endangered at the facility due to the petitioner's behavior. The petitioner had exhibited aggressive and inappropriate behaviors since her admission to the facility, including, but not limited to, calling the facility staff racist names, demonstrating anger at staff and making verbal threats with threatening gestures to her roommates. The petitioner's physicians believed the petitioner might not be a danger to herself or others if she were appropriately treated, but that the discharge facility would better meet the petitioner's needs as compared with the respondent facility.

The reasons for which a Medicaid or Medicare certified nursing facility may discharge a patient are limited by the Federal Regulations. A discharge is permitted based on potential endangerment of other residents and is further permitted based on the fact that an individual's needs cannot be met at the facility.

The notice of discharge was signed by the petitioner's physician and showed that other individuals' safety was endangered by the petitioner's remaining at the facility. Both documentary and testimonial evidence provided further support for the same. Given that evidence, the respondent facility was found to have met its burden by clear and convincing evidence to show that the petitioner's stay at the respondent facility endangered other individuals. Appeal denied.

Petitioner v. Respondent, Appeal No. 09F-03265 (August 12, 2009)

The petitioner received home health aide services for children and Children's Medical Services Network (CMSN) benefits until Mar. 25, 2009, before reaching the age of 21. At issue is the agency's cancellation of the petitioner's home health aide services for children and discontinuing the CMSN Plan upon the petitioner reaching the age of 21.

The Florida Administrative Code at 59G-4.130 provides for home health services, and states as follows:

> **Covered Services for Children**
>
> Medicaid reimburses for the following services provided to eligible recipients under age 21 years:
>
> Licensed nurse and home health aide visits; private duty nursing; personal care; occupational, physical and speech language pathology evaluations and treatments; and durable medical equipment and supplies.
>
> The Children's Multidisciplinary Assessment Team Statewide Operation Plan states in part:
>
> **Eligibility**
>
> **Medicaid Eligible Children**
>
> The CMAT may staff any Medicaid eligible child less than 21 years of age who has a medically complex or medically fragile condition requiring continual medical, nursing, or health supervision and has medical documentation to support the need for long term care services.

As provided above, coverage for these services extends to eligible recipients under the age of 21. Appeal denied.

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