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## Introduction

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## INTRODUCTION

JOHN S. CLARDY III\*

The practice of elder law covers many legal subjects and is considered a horizontal rather than a vertical practice of law. A criminal law attorney representing a client accused of shoplifting will look to the same section of the criminal code whether the client is 18 or 81. An elder law attorney will rely on many different laws and procedures based on the needs of a particular client.

Elder law is defined by the client to be served.<sup>1</sup> The elder law attorney does not focus on a particular law or statute, but a segment of the population. The problems affecting a senior client will dictate the specific legal solutions offered by the attorney. While I began my legal career as a traditional estate-planning attorney, it transformed as the issues I was presented with were less about what happens when the client dies, and more about what happens when the client keeps living, but due to age or disease, lacks the ability to remain independent.

The broad range of issues that can present themselves on a daily basis keeps an elder law practice interesting. Estate planning and administration, asset preservation, incapacity planning and guardianship, qualification for federal, state and local assistance programs, care planning, and protection from abuse, neglect and exploitation are but a few examples. Additionally, the ability to offer solutions to complex problems that profoundly affect the lives of seniors and their families can be professionally and personally satisfying.

Florida's demographics provide unique opportunities for the practice of elder law. The sheer number of senior Floridians creates a wide diversity in the client base and the chance to encounter a variety of client issues. The fact that Florida is a retirement destination has created

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1. See *Why an Elder Law or Special Needs Law Attorney?*, NATIONAL ACADEMY OF ELDER LAW ATTORNEYS, INC., [http://www.naela.org/Public/Library/Fact\\_Sheets/Why\\_and\\_Elder\\_Law\\_Attorney\\_is\\_a\\_Good\\_Choice/Public/About\\_NAELA/Fact\\_Sheets/Why\\_an\\_Elder\\_Law\\_Attorney\\_is\\_a\\_Good\\_Choice.aspx?hkey=2372949f-1d70-4c7a-8681-cb72b3a9100f](http://www.naela.org/Public/Library/Fact_Sheets/Why_and_Elder_Law_Attorney_is_a_Good_Choice/Public/About_NAELA/Fact_Sheets/Why_an_Elder_Law_Attorney_is_a_Good_Choice.aspx?hkey=2372949f-1d70-4c7a-8681-cb72b3a9100f) (last visited Dec. 9, 2013).

dispersed families and a need to create alternatives to the traditional family support system as a senior's ability to remain independent declines.

When my father was born in Florida during World War II, our state was quite different from what it is today. Florida was one of the least populated southern states with less than two million people, and only seven percent of its residents were over the age of sixty-five.<sup>2</sup> The end of World War II not only saw the beginning of the Baby Boom generation, but also the beginning of Florida's economic and population boom.

Today, Florida has more than 19 million residents, of which 18 percent are over the age of sixty-five.<sup>3</sup> With more than 3.5 million residents sixty-five or older, Florida's senior population is greater than twenty-one other states' total population.<sup>4</sup> As the fourth most populous state with the country's highest percentage of seniors,<sup>5</sup> laws and programs affecting the elderly have a greater impact here than in most other states. As our state's seniors continue to age, more and more of our clients will face cognitive and physical impairments due to age and illness. Elder law attorneys face issues not normally encountered in other areas of the law.

When dealing with clients with diminished capacity, elder law attorneys are often involved with family members and others interested in a senior client's well-being, and confusion can arise as to who is the client, and whose interest is being served by the representation. The Florida Bar Rules of Professional Conduct set the minimum standard for an attorney's conduct and responsibilities to a client. Avoiding conflicts of interest,<sup>6</sup> preserving confidentiality,<sup>7</sup> and dealing with a client under a disability<sup>8</sup> are several of the more common rules that must be followed when representing a senior client. The National Academy of Elder Law Attorneys has developed Aspirational Standards for the ethical conduct of elder law

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2. Stanley K. Smith, *Florida Population Growth: Past Present and Future* tbls.1 & 9 (June 2005), [http://www.befr.ufl.edu/files/FloridaPop2005\\_0.pdf](http://www.befr.ufl.edu/files/FloridaPop2005_0.pdf).

3. *State & County QuickFacts: Florida*, UNITED STATES CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/12000.html> (last updated June 27, 2013).

4. *Id.*; see *2012 State Population Census Estimates*, GOVERNING, <http://www.governing.com/gov-data/state-census-population-migration-births-deaths-estimates.html> (listing all of the states' total populations). In 2012, seniors over age sixty-five accounted for 18.2% (3,515,717) of Florida's total population of 19,317,568. *State & County QuickFacts: Florida*, *supra* note 3.

5. UNITED STATES CENSUS BUREAU, *THE OLDER POPULATION: 2010* 10 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-09.pdf>.

6. R. REGULATING FLA. BAR 4-1.7, 4-1.8, 4-1.8 (2013).

7. R. REGULATING FLA. BAR 4-1.6 (2013).

8. R. REGULATING FLA. BAR 4-1.14 (2013).

attorneys which go above and beyond the Rules of Professional Conduct.<sup>9</sup> This standard recognizes the vulnerable nature of many elderly clients and ensures that attorneys representing these clients take care to protect their interests during the representation.

Planning for incapacity is a major focus of elder law. End of life decisions can be especially difficult on families and decision makers, with grief and guilt clouding judgments, and underlying family tensions rising to the surface during very stressful times. Brooke Benzio's article discusses Living Wills and Do Not Resuscitate Orders, and some of the competing interests involved in carrying out a patient's wishes regarding care at the end of life. Also in this issue, Alex Cuello and Stephanie Villavicencio critique the methods of determining legal capacity in guardianship proceedings.

A special consideration in financial and incapacity planning that is making news these days has to do with same-sex couples. With the recent Supreme Court decisions in *United States v. Windsor*<sup>10</sup> and *Hollingsworth v. Perry*,<sup>11</sup> how will these decisions affect same-sex couples' federal benefits in Florida, a non-recognition state? Melissa Barnhardt, Jessica Lillesand, and Denise Lettau assess planning opportunities for the aging LGBT community on a timely topic.

What happens when an individual outlives her ability to properly care for herself? Purchasing long term care insurance provides funding to age in place and opportunities to pay for care privately in a wider range of residential settings than relying on public assistance programs. Enrique Zamora, Deborah Nodar, and Krista Ogletree explore long term care insurance and its benefits to seniors.

For those who cannot afford to purchase, cannot qualify for, or fail to take advantage of long term care insurance to fund their care, Florida's Medicaid program is available for those who qualify. Florida has requested and received federal waivers to privatize its 21-billion-dollar Medicaid program by transferring its administration to private Managed Care Organizations. This move is being watched around the country and the care of Florida's most vulnerable residents hangs in the balance. Rebecca Bell explains how this process will unfold around the state and what safeguards for the rights of beneficiaries are included in a plan that is

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9. Gregory French, et al., *Aspirational Standards for the Practice of Elder Law*, 2 NAELA 5 (2006), [http://www.naela.org/App\\_Themes/Public/PDF/Media/AspirationalStandards.pdf](http://www.naela.org/App_Themes/Public/PDF/Media/AspirationalStandards.pdf).

10. *United States v. Windsor*, 133 S.Ct. 2675 (2013).

11. *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013).

unprecedented in its size and scope.

The Elder Law Section of the Florida Bar thanks the St. Thomas Law Review staff for dedicating this issue to this dynamic and growing area of practice. Seniors are an important segment of Florida's population and their unique needs and the laws affecting them are worthy of study and comment. We hope you find this information timely and informative.